

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

United States of America,

Plaintiff,

vs. Criminal Action Nos. 3:21-cr-49-1,2

Jonathan Toebbe,

Diana Toebbe,

Defendants.

Proceedings had in the Sentencing Hearings in the
above-styled action on November 9, 2022, before the Honorable
Gina M. Groh, United States District Judge, at Martinsburg,
West Virginia.

APPEARANCES

On behalf of the United States of America:

Jarod J. Douglas
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The defendants were present in person.

Proceedings reported by means of stenotype; transcript produced
by official court reporter.

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APPEARANCES (Continued)

On behalf of the United States of America:

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On behalf of the defendant, Jonathan Toebbe:

Nicholas Compton
Assistant Federal Public Defender
Federal Public Defender's Office
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On behalf of the defendant, Diana Toebbe:

Barry Beck, Esq.
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Probation Officer Michael C. DeHaven was present.

P R O C E E D I N G S

(November 9, 2022, at 11:09 A.M.)

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THE COURT: Please be seated, everyone. We will call our cases.

THE CLERK: This is the case of the United States of America versus Jonathan Toebbe and Diana Toebbe, Criminal Numbers 3:21-cr-49, defendants 1 and 2.

The government is represented by counsel, Jarod Douglas, Jessica Smolar, and Derek Shugert. The defendants are present in person and by counsel Nicholas Compton for Mr. Toebbe, Barry Beck and Jessica Carmichael for Mrs. Toebbe.

Are the parties ready to proceed?

MR. DOUGLAS: The United States is ready, Your Honor.

MR. COMPTON: Jonathan Toebbe is ready, Your Honor.

MR. BECK: Good morning, Your Honor. Mrs. Toebbe is ready.

THE COURT: Good morning. All right, counsel, I'm going to go ahead and get the defendants under oath. We'll start with Mrs. Toebbe.

If you'll stand and raise your right hand, please, ma'am, we're going to get you under oath to answer any questions I may have for you today.

(The defendant, Diana Toebbe, was sworn in.)

DEFENDANT DIANA TOEBBE: I do.

1 THE CLERK: Thank you.

2 THE COURT: Ms. Toebbe, I'll remind you now you're
3 under oath, and if you make any untruthful statements or
4 answers during today's proceeding, those untruthful statements
5 or answers could form the basis for a separate action for
6 perjury or false swearing. That having been said, feel free to
7 ask questions. If you don't hear something, ask for it to be
8 repeated. If you don't understand something, ask for an
9 explanation. And at all times, feel free to consult with your
10 lawyers. Fair enough?

11 DEFENDANT DIANA TOEBBE: Yes, ma'am.

12 THE COURT: All right.

13 Mr. Toebbe, if you will please stand. We're going to
14 administer the same oath.

15 THE CLERK: If you'll raise your right hand, sir.

16 (The defendant, Jonathan Toebbe, was sworn in.)

17 DEFENDANT JONATHAN TOEBBE: I do.

18 THE CLERK: Thank you.

19 THE COURT: Mr. Toebbe, the same thing for you.

20 You're under oath now. If you make any untruthful statements
21 or answers during today's proceeding, those untruthful
22 statements or answers could form the basis for a separate
23 action for perjury or false swearing. That having been said,
24 feel free to ask questions. If you don't hear something, ask
25 for it to be repeated. If you don't understand something, ask

1 for an explanation. And at all times, feel free to consult
2 with your lawyer. Fair enough?

3 DEFENDANT JONATHAN TOEBBE: I understand. Thank you,
4 Your Honor.

5 THE COURT: You're welcome.

6 Before we get started, Mr. Douglas and Mr. Compton and
7 Mr. Beck, in looking at the money that was recovered in this
8 case, it appears as though \$54,300 of the 100,000 was
9 recovered, that earnest money, but there's still \$45,700
10 unaccounted for. Is that the amount?

11 MR. DOUGLAS: That is the correct figure, Your Honor.

12 THE COURT: All right. Where did the rest of the
13 money go?

14 MR. DOUGLAS: The rest of the money is accounted for
15 Your Honor, in Mr. Toebbe's report that he spent a certain
16 amount of it.

17 THE COURT: Uh-huh.

18 MR. DOUGLAS: Okay. And then in addition to that,
19 the fluctuation of the value of the Monero cryptocurrency
20 which, according to the FBI -- and they kind of have a little
21 more of an expertise in that than I do -- it matched to the
22 fluctuation that had occurred during that passage of time
23 before we were able to get access to it.

24 THE COURT: And that's your understanding,
25 Mr. Compton and Mr. Beck, as well?

1 MR. COMPTON: Yes, Your Honor.

2 MR. BECK: Agreed, Your Honor. That's our
3 understanding.

4 THE COURT: And I know I had a question that I think
5 probation had gotten with you on, Mr. Douglas, about
6 restitution. If that could be ordered in restitution. The
7 remaining amount that was unrecovered. But apparently,
8 according to the section under which the plea has been made,
9 unless restitution is specifically in the plea agreement, then
10 the Court can't order restitution?

11 MR. DOUGLAS: Yes, Your Honor. So my understanding
12 of the restitution law is that either it's mandatory
13 restitution, and there's enumerated offenses that doesn't
14 include this offense --

15 THE COURT: Right.

16 MR. DOUGLAS: -- or if it's discretionary, then the
17 parties still need to agree to it in the plea agreement under
18 3663(a)(3) which the plea agreement is silent on that issue.

19 THE COURT: Okay. We're going to take a quick break
20 real quick and get back out here on the record, and then we'll
21 get started. What I plan to do -- I don't know whether our
22 courtroom deputy let you all know or not -- is we'll start with
23 Mrs. Toebbe, and then we'll move on to Mr. Toebbe's sentencing.
24 I will let you know that I'm inclined to take these pleas
25 today.

1 (Recess 11:24 A.M. - 11:31 A.M.)

2 THE COURT: Please be seated, everyone.

3 All right. We'll proceed with Ms. Toebbe's matter first.
4 Has defense counsel received the presentence investigation
5 report?

6 MR. BECK: We have, Your Honor.

7 THE COURT: And have you, Ms. Toebbe, received that
8 report and reviewed it to your satisfaction with your lawyer?

9 DEFENDANT DIANA TOEBBE: Yes, ma'am.

10 THE COURT: The government has received and reviewed
11 it of course?

12 MR. DOUGLAS: Yes, Your Honor.

13 THE COURT: And referring to the latest versions;
14 correct?

15 MR. DOUGLAS: Yes, Your Honor.

16 THE COURT: All right. We do have some objections to
17 the report so let's go ahead and take care of those now.

18 Mr. Beck, I'm looking through these. Objection No. 1 to
19 what's now page 23, paragraph 154. That report has been
20 revised so are you satisfied with that?

21 MR. BECK: We are, Your Honor.

22 May I use the podium, Your Honor?

23 THE COURT: Absolutely.

24 MR. BECK: Thank you, Your Honor.

25 Yes. That objection has been resolved, Your Honor.

1 THE COURT: Okay. And then Objection No. 2, is that
2 just a holdover from the last time we were here before the
3 Court on the Court's consideration of the original plea
4 agreement? Because it refers to a downward variance, but we've
5 got a binding in Ms. Toebe's case to the low end of the
6 guideline range.

7 MR. BECK: It is -- well, not more than the low end,
8 Your Honor.

9 THE COURT: Right.

10 MR. BECK: Yeah, I suppose it is a holdover to the
11 extent that we're still requesting that the Court go below the
12 guidelines. Not --

13 THE COURT: Okay. So let's put it this way. Because
14 you filed the new motion for a variant sentence below the low
15 end of the guideline range, this really dovetails into that so
16 the objection is no longer before the Court because I -- you
17 know I'm going to consider your motion for variant sentence?

18 MR. BECK: I'm sorry, Your Honor?

19 THE COURT: This objection is no longer technically
20 before the Court because you know I'm going to consider your
21 motion for variant sentence which is the same thing?

22 MR. BECK: Correct.

23 THE COURT: Okay. So we can say it's withdrawn
24 because I'm considering your motion?

25 MR. BECK: That's correct, Your Honor.

1 THE COURT: Okay. I do have a question on if I
2 rejected the plea because it was woefully insufficient the last
3 time around on round one, why Ms. Toebbe believes that I would
4 consider a three-year sentence at this point?

5 MR. BECK: Well, Your Honor, I hope that --

6 THE COURT: And I'll -- you can further explore that
7 later when we get to the dispositional phase --

8 MR. BECK: Right.

9 THE COURT: -- but I am curious.

10 MR. BECK: Well, Your Honor, I would hope -- and this
11 may -- I don't want to tout our horn too much here, but I would
12 hope that this time, the Court has been given information from
13 us that casts more light on what other courts have considered
14 reasonable sentences in these kind of cases. As you know, we
15 presented the Court with a memorandum --

16 THE COURT: That said they were all very low. We
17 double checked that and everything was correct.

18 MR. BECK: Well, Ms. Carmichael and I spent a lot of
19 time on that, Your Honor, trying to --

20 THE COURT: I can see that, and I appreciate that.

21 MR. BECK: -- trying to give the Court a greater
22 perspective on these kind of cases because, quite frankly, I've
23 never had one before. And I know the Court has had a few, but
24 they tend to happen in other places more often. So we wanted
25 to give the Court a greater perspective on what might be a

1 reasonable sentence in this case, particularly in light of what
2 we believe are mitigating factors here concerning Ms. Toebe's
3 role in the offense and her personal history and
4 characteristics.

5 So that's why we come before you today again, Your Honor,
6 at least asking you to consider a three-year sentence and, at a
7 minimum, consider a sentence below the applicable guideline
8 range.

9 THE COURT: Okay. That takes care of all the smaller
10 objections as well. Let's back up to the objections now. Now
11 we have this more meaty objection with regard to the
12 enhancement for the obstruction which is still on the table
13 because that was included in the guideline calculations by the
14 probation officer in the PSR. Correct?

15 MR. BECK: Right, Your Honor.

16 THE COURT: And that's the last objection that the
17 defendant raises to the PSR?

18 MR. BECK: That's correct, Your Honor.

19 THE COURT: Okay. And there were some clarifications
20 by the government with regard to the PSR. Let's flip over to
21 that.

22 Mr. Douglas, what's styled as Objection No. 2 but you note
23 in the beginning this is --

24 You can stay there, Mr. Beck, because this is going to be
25 real quick.

1 MR. BECK: Oh, okay.

2 THE COURT: Thank you.

3 This -- it states this is less of an objection and more of
4 a request for clarification. Was that just clearing up how the
5 plea agreement was presented to the Court in that PSR?

6 MR. DOUGLAS: That as well as trying to provide some
7 additional context to what we discussed in those letters --

8 THE COURT: Okay.

9 MR. DOUGLAS: -- specifically regarding sort of a
10 predetermined cover story that was discussed to the extent that
11 that is something the Court considers or gives any weight.

12 THE COURT: Well, that was Objection No. 1 that you
13 stated this is less an objection, more of an offer, and I
14 understand that. And I'll await your response after Mr. Beck
15 puts forth his argument against that enhancement. But there
16 was a second one that was objection -- this is less of an
17 objection, more of a request for clarification, but it dealt
18 with the terms of the binding plea agreement.

19 MR. DOUGLAS: Yes. The way that the government
20 originally read that paragraph in the presentence report seemed
21 to be not accurate to how the provision is in the binding plea
22 agreement.

23 THE COURT: And now you're satisfied with the
24 revision?

25 MR. DOUGLAS: Yes, Your Honor.

1 THE COURT: Okay. You as well, Mr. Beck?

2 MR. BECK: Correct, Your Honor.

3 THE COURT: Okay. So that leaves only the objection
4 to the enhancement for the obstruction?

5 MR. BECK: That's right, Your Honor.

6 MR. DOUGLAS: Yes, Your Honor.

7 THE COURT: Okay. Just to make the record clear on
8 this so the record is clear in case there's any appellate
9 review of this, what we're talking about is that on
10 October 4th, probation office -- of this year -- the probation
11 office received information that some months prior, Mrs. Toebbe
12 made attempts to contact her husband, Mr. Toebbe, through
13 illicit channels of communication. Specifically, on two
14 occasions, she tried to send handwritten letters to him. And
15 those were intercepted, of course, by those folks monitoring
16 the communication between the codefendants at the jail;
17 correct?

18 MR. BECK: That's right, Your Honor.

19 THE COURT: Mr. DeHaven, since you're the PO on this
20 case, when did these letters first come to your attention just
21 to make sure it's clear on the record?

22 MR. DEHAVEN: The first copy of a letter we received
23 was provided by regional jail staff I believe on October 7th.
24 On October 9th, the government provided copies of both the
25 letters in question.

1 THE COURT: Okay. And you had reached out to the
2 jail --

3 MR. DEHAVEN: Yes.

4 THE COURT: -- based on a request from the Court on
5 whether there was any interception of anything that would
6 affect my determination at sentencing in this case and whether
7 to accept these pleas in fact?

8 MR. DEHAVEN: Yes, Your Honor. Subsequent to the
9 Court's rejection of the previous plea agreement and the
10 defendant's entry of a second guilty plea, our office reached
11 out to the jail at the Court's request and in an effort to
12 provide supplemental information for the presentence report.
13 We requested information regarding their status, any issues,
14 disciplinary concerns, or other problems at the jail, and
15 that's when we were made aware of the attempts at
16 communication.

17 THE COURT: And who did you receive these letters
18 from?

19 MR. DEHAVEN: The first --

20 THE COURT: The jail or the government?

21 MR. DEHAVEN: Initially, we received one letter from
22 the jail on October 7th. The government also was working to
23 provide copies of the letters. They provided copies of both
24 letters to us on the 9th.

25 THE COURT: And for a full understanding, how does it

1 come about that the jail comes into this information, and what
2 do they do when they obtain information such as this?

3 MR. DEHAVEN: My understanding is the ingoing and
4 outgoing mail of both Mr. and Mrs. Toebbe was monitored by jail
5 staff with information being provided to the government. The
6 first letter in question, I believe the December letter, was
7 attempted to be transmitted through another inmate, an inmate
8 trustee in the laundry room, and was intercepted. The second
9 letter was attempted to be mailed out of the jail with a
10 falsified return address. It came back in, and in the process
11 of monitoring the mail, incoming and outgoing, the jail
12 discovered it.

13 THE COURT: So I presume that the government gets
14 these intercepted communications close in time to when they're
15 intercepted?

16 MR. DEHAVEN: Yes. I believe both letters were in
17 possession of both the government and defense counsel in early
18 January of 2022.

19 THE COURT: So I guess my question is, Ms. Smolar or
20 Mr. Douglas, why weren't these provided to the Court?

21 MR. DOUGLAS: Your Honor, really, you know, as this
22 came up, as -- and everything he described is accurate.
23 Mr. DeHaven. When this came up in early October -- and he only
24 really brought to the attention the first letter. Said, oh,
25 well, actually there's two letters. Okay.

1 THE COURT: Okay. I appreciate your filling in the
2 blanks on this.

3 MR. DOUGLAS: Yes. And, Your Honor, it was not any
4 kind of a deliberate decision, as I've indicated to
5 Mr. DeHaven, that we sort of withheld that from the probation
6 office. Of course not. At the point where they entered the
7 pleas, we kind of moved on. Moved on to getting their
8 cooperation, which the Department of Navy values extremely in
9 this case, and got both of their cooperations. And so we
10 weren't even really considering the letters at all anymore at
11 that point in time.

12 THE COURT: And no one thought, Ms. Smolar or you,
13 that it would have been important for the Court to consider the
14 letters considering their nature?

15 MR. DOUGLAS: In hindsight at this point, Your Honor,
16 obviously, I can see where this would be something that's
17 relevant to the Court.

18 THE COURT: All right. Well, to be clear on the
19 record on these -- thank you.

20 MR. DOUGLAS: Thank you.

21 THE COURT: The first letter is dated December 21,
22 2021, and it starts with, "Flush this once you've read it."

23 "Dear Jon,

24 "Flush this once you've read it. My feelings right now are
25 very complex and include feeling betrayed, lied to, abandoned,

1 and cheated. But you don't simply throw away 18 years of
2 marriage. I still love you. Beyond that, I don't know what to
3 think.

4 "First, it was a bitcoin algorithm that was going to make
5 us our millions. Then it was selling the algorithm itself.
6 Then it was these privacy deals with encryption keys and God
7 knows what else. And the whole time, it was all bullshit.
8 You've put me in great danger. Even with the weakness of the
9 government's case, I may still be convicted on circumstantial
10 evidence. I could go to jail for life for something I didn't
11 do.

12 "My lawyers don't think they will give you a plea deal that
13 doesn't involve me pleading guilty too. I may rot in here
14 unless you do what you're probably trying to avoid doing.
15 Plead guilty. Tell them the truth. I didn't know anything
16 about any of this. That's the only way I get out of here. I
17 hate to ask you to do it, but if you don't for me, do it for
18 our sons. They deserve to be raised by one of us.

19 "They are going to appeal the rejection of my detention
20 hearing, but my lawyers don't have any much hope of that
21 succeeding. They really think that the best hope for me is a
22 guilty plea from you. I don't know why you chose to do what
23 you did. I can't hope to ever understand the mindset, but I
24 hope I can still count on you to do the right thing and tell
25 the truth at this stage. If you plead guilty, they may still

1 be lenient with you.

2 "I'm always thinking about you and praying you will do
3 what's right."

4 And then she signed it "Love, Diane." But there's a PS
5 that says, "I'm so sorry for not sending more messages through
6 the phone. They're always listening. I was told if I even
7 said I love you, it would be used against me."

8 And there's a second part to this letter.

9 "When you get this, please reply. My roommate works in the
10 laundry and can intercept and deliver messages. If your
11 laundry bag has a note for me, tie a sock around the knot of
12 the bag. That way she will know to get the note before it goes
13 in the wash."

14 And then she says, "I'm now in BJ. Goldie will still do
15 letters for us."

16 Then there's a second letter, January 4, 2022, and this one
17 was sent by what they call or refer to in the jail as a
18 boomerang where Ms. Toebbe, as confirmed on the envelope -- a
19 copy of which the Court has received -- put Mr. Toebbe's name
20 in the return address there at the ERJ here in Martinsburg in
21 the return address spot. And then it went to L. Toebbe at --
22 who I presume is a fake person -- at a fake address in
23 Martinsburg. So basically, it's sent. It boomerangs. When it
24 comes back, it goes to the return address so that's how
25 Mr. Toebbe would have gotten ahold of it if it wasn't

1 intercepted.

2 This letter of January 4, 2022, reads:

3 "Dear Jon,

4 "I'm trying again to get a message to you. My friend
5 swears that this will work. It's called boomeranging. The
6 things you learn in this place. I originally tried to send you
7 a message by the laundry, but this may be safer. Tell me if
8 you got my first note by pulling the same trick in reverse.

9 "I'd tell you that this place is hell, but you already know
10 that. What you may not know is that my lawyers aren't so sure
11 of my chances unless you plead guilty and tell the truth that I
12 had nothing to do with this and give up the locations and/or
13 passwords for where you've hidden the money and the secrets.
14 They think I'm a flight risk who will defect and sell what you
15 had if they let me out. And they won't give you a plea deal
16 that isn't contingent on my taking one too. Also, we need your
17 testimony to get me out, and we can't call you as a witness
18 unless you've pleaded guilty."

19 And then she struggles with whether it's "pled" or
20 "pleaded" and then says "sigh."

21 "My lawyers say you will have to do this eventually. I
22 don't know what you're being told. My feelings are all over
23 the place. Of course I love you. I've loved you for 20 years,
24 but I also feel hurt, betrayed, abandoned, and lost. All that
25 talk about bitcoin and about some of the algorithm and then the

1 privacy" -- I don't understand what that means -- "and then the
2 privacy" -- I can't understand the word. The privacy nuts
3 maybe -- "who could have been criminals for all we knew." I
4 think the word is "nuts" there.

5 "I believed you, and it was all bullshit. Right now I need
6 to focus on the boys and getting back to them to give them
7 something of what remains of their childhood. They deserve
8 that much.

9 "I wish I knew what else to say. You heard, I think, that
10 I got moved to B5 because I was being threatened. That was
11 scary as hell. And if it happens again, the only place they
12 can put me is solitary since they don't have protective
13 confinement for women here. I am scared. I'm keeping my head
14 down, but I just never know when it will start up again.
15 Please tell me what you're thinking. I'm so desperate and
16 alone.

17 "Love, Diana."

18 So that's not obstructing, Mr. Beck?

19 MR. BECK: Well, Your Honor, if I may first touch on
20 the question you asked Mr. Douglas about the Court not having
21 this information previously.

22 THE COURT: Did you? When did you get it?

23 MR. BECK: I had it -- I think I had -- I had one
24 letter for sure. I think I had both of them, and I'm not
25 saying I didn't have both of them. I certainly had one of

1 them.

2 THE COURT: I don't expect -- in asking that
3 question, I don't expect for you as the defense attorney to be
4 throwing a shovelful of dirt on your defendant when she's
5 already down -- on your own client. So I'm not saying you
6 didn't provide anything you should have to the Court, but I'm
7 curious as to when you received it.

8 MR. BECK: It was certainly in the -- it was prior to
9 the entry of our first plea, Your Honor. The exact date I
10 cannot say, but Mr. Douglas -- I have no doubt his side
11 provided it to us in a timely manner. We were --

12 THE COURT: So the -- so we were here on the -- so it
13 was before you entered the -- before you reached the first plea
14 agreement or before we came here for the Court to consider the
15 plea?

16 MR. BECK: I'm certain it was before we reached the
17 first plea agreement, Your Honor.

18 THE COURT: And when did you reach the first plea
19 agreement in this case?

20 MR. BECK: I have it here in my notes, Your Honor,
21 but --

22 THE COURT: I'll find it. I only have the second one
23 here in front of me easily retrievable.

24 MR. BECK: I believe it was February of this year,
25 Your Honor, if I'm not mistaken.

1 THE CLERK: 2/14.

2 THE COURT: 2/14. That's when it was signed.

3 MR. BECK: Okay. February this year.

4 THE COURT: Okay. Thanks, Chad.

5 MR. BECK: So I do, in fact, believe Mr. -- I mean,
6 Mr. Douglas may be able to confirm this but -- and I don't want
7 to misstate this, but I'm fairly certain that we were aware of
8 at least one of the letters prior to entry of the first plea
9 agreement.

10 THE COURT: Did you ever -- were you ever aware of
11 them, Mr. Compton?

12 MR. COMPTON: Yes, Your Honor.

13 THE COURT: Okay. When did you receive them? Again,
14 I don't expect you to throw dirt on your client to bury him on
15 this sort of information to bring it to the Court's attention.

16 MR. COMPTON: I don't recall honestly, Your Honor,
17 when exactly I received them. It was close in time to when
18 they were intercepted and shortly after the government, I
19 believe, was made aware. I --

20 THE COURT: So before you all came here for me to
21 consider the original plea agreements?

22 MR. COMPTON: I'm almost positive it was before the
23 change of plea hearing which was on the 14th. I believe it was
24 closer in time to when they were intercepted.

25 THE COURT: Okay. Thank you.

1 Mr. Douglas.

2 MR. DOUGLAS: Yes, Your Honor. The -- both letters
3 were sent to both counsel within a week or so of our receipt of
4 them so within the first half of January 2022 which would be a
5 month before the first pleas were reached.

6 THE COURT: Thank you.

7 Mr. Beck.

8 MR. BECK: So, Your Honor, I just want to explain
9 that we had the letters. We subsequently entered -- and
10 obviously having received the letters, it was disappointing to
11 counsel that Mrs. Toebbe had made this effort. We certainly --
12 you know, as attorneys we weren't happy with that, but after
13 we -- well, a couple things. We -- after we entered the plea
14 agreement and while we were negotiating it, I can say and I can
15 confess that it never occurred to me that these would rear
16 their heads again and became an issue at the sentencing
17 hearing. Perhaps -- and I can explain in a moment why the
18 thinking was in that direction at the time. Some of it was
19 though that it was, as Mr. Douglas said, we reached a plea
20 agreement; and it's like after the ballgame where everybody is
21 fighting during the game and hates each other. You come
22 together, you shake hands, and, you know, all sins are
23 forgiven. And it just never --

24 THE COURT: But the referee never saw the
25 interaction.

1 MR. BECK: I agree, Your Honor.

2 THE COURT: The referee that has to make the call.
3 Right?

4 MR. BECK: The referee had to make a call here. But
5 -- and, again, I'll discuss in a moment why the other factors
6 that I think went into our not thinking this would be an issue,
7 in addition to the fact that we were at that stage where we had
8 entered a plea agreement with the government, and we were --
9 had a binding plea, and there really wasn't any more that we
10 were fighting about, and Mrs. Toebebe was cooperating and had
11 admitted her guilt. So I --

12 THE COURT: So she -- so admitted her guilt by
13 saying -- by not saying I just thought this was some bitcoin
14 thing. She admitted her guilt in the charge to which she is
15 about to be --

16 MR. BECK: That's right.

17 THE COURT: -- about to be found guilty. Right?

18 MR. BECK: Right. And, you know, at that point --

19 THE COURT: So the bitcoin was a cover story?

20 MR. BECK: No question, Your Honor. And I want to
21 talk about that for a second if I can. So the question before
22 the Court now is whether or not her ill-advised and unfortunate
23 decision to try to send these letters to her husband should
24 justify an obstruction of justice enhancement under the
25 guideline. And what I would say to that, Your Honor, is that

1 the guideline itself talks about two kinds of obstruction as I
2 read it in Commentary No. 1. It talks about the classic type
3 of obstruction that we have seen more often in this court and
4 other courts where someone is indicted. There's a witness
5 that's going to testify against them. They either make threats
6 to them or their family or they try to bribe them. But there's
7 no --

8 THE COURT: Or they try to encourage them to perjure
9 themselves --

10 MR. BECK: That's right, Your Honor.

11 THE COURT: -- as she did here.

12 MR. BECK: The --

13 THE COURT: Plead guilty and tell them I'm innocent.

14 MR. BECK: The distinction though, Your Honor, I
15 think is that in those scenarios, the classic type of
16 obstruction, there is no preconceived plan between the two
17 parties that are subject to -- that are the subject of the
18 alleged obstruction. In other words, the person who is on
19 trial didn't have a plan prior to getting arrested and
20 prosecuted. That, hey, I'm going to threaten you, and you're
21 going to tell -- that's usually not what we're talking about.
22 And the reason I say that, Your Honor, is if you look at
23 Commentary Note 1, it makes a distinction about obstructed --
24 obstructive conduct that occurred prior to the start of the
25 investigation, and it talks about that sometimes may be covered

1 if the conduct was purposely calculated and likely to thwart
2 the investigation or prosecution of the offense.

3 THE COURT: And it was -- right? -- because that was
4 their cover story on how Mrs. Toebe was innocent, and her
5 husband was going to take the fall for it. So maybe in the
6 usual case, defendants aren't as smart as these two, but
7 they're -- this offense of -- that's about to be the offense of
8 conviction involves a covert operation. Stuff in a thumb drive
9 and a peanut butter sandwich. A lot like stuff in a contraband
10 note at the jail, against the jail rules, into a laundry basket
11 with a sock tied around it. Right?

12 MR. BECK: Right, Your Honor. You're correct. This
13 was a preconceived, preplanned cover.

14 THE COURT: And then she continued it at the jail.

15 MR. BECK: Well --

16 THE COURT: She kept that plan in action. She wrote
17 a note to the defendant, to Mr. Compton's client, Mr. Toebe,
18 that basically pressures him with, oh, I'm so scared. My
19 children. You got to tell the truth which she knew wasn't the
20 truth. When you plead guilty, you know, you plead guilty, and
21 you deploy this -- basically to me, how I interpret this is now
22 it's time to deploy the cover plan. So you go forth, and you
23 plead guilty, and you perjure yourself and tell them I had
24 nothing to do with this.

25 MR. BECK: What I would say to that, Your Honor,

1 first of all, is that -- I think it's -- it should be
2 considered a factor in the Court's evaluation of this that
3 there's no dispute that the plan, the cover, was the brainchild
4 of Mr. Toebbe who was running this operation.

5 THE COURT: It looks like she's driving the bus, and
6 it looked like she was driving the bus in the communications
7 that I had to review in preparation for the bond appeal
8 decision that Magistrate Trumble made way back when I first got
9 involved in this case as well.

10 MR. BECK: Well, there were communications between
11 her and Mr. Toebbe where they talked about what they were doing
12 and why. But I don't think there's any dispute -- and, you
13 know, if the government disagrees or Mr. Toebbe disagrees, they
14 can certainly tell the Court -- that this was his cover plan to
15 purposely protect Mrs. Toebbe in the event they were both
16 captured so that there would be someone remaining to take care
17 of their children.

18 THE COURT: Okay. Let's ask Mr. Compton as you
19 referred to Mr. Toebbe's counsel.

20 Mr. Compton, who is driving the bus on this cover story?

21 MR. COMPTON: Your Honor, I am hesitant to insert
22 Mr. Toebbe into this scenario. Mr. Toebbe never received these
23 communications from the codefendant. I am aware through
24 communications with my client that prior to them being
25 arrested, they had discussed what would happen if they were to

1 be arrested. I'm also aware that when Mr. Toebbe was arrested
2 and counsel was appointed that we had proceeded on the path
3 that the Court is now -- has seen over the last several months,
4 including our interactions with the government and our
5 compliance with paragraph 7 of the plea agreement.

6 Mr. Toebbe -- I mean to the extent I can answer the Court's
7 question, Mr. Toebbe did not direct Mrs. Toebbe in any way to
8 write these letters. He didn't send her any letters that I'm
9 aware of --

10 THE COURT: You're unaware -- are not aware of them
11 either?

12 MR. COMPTON: So, again, I guess I'm hesitant to
13 insert Mr. Toebbe into this. He has proceeded on the path --

14 THE COURT: On his own path.

15 MR. COMPTON: -- from the very beginning of his case.
16 I believe he has been truthful and honest throughout. I know
17 that doesn't quite answer the Court's question.

18 THE COURT: That's fair. As his counsel looking out
19 for his best interest, I suppose that puts you in a bad spot,
20 and that's as far as you can go. So I understand that.

21 MR. COMPTON: Thank you.

22 THE COURT: Mr. Douglas, did you have something to
23 add before we go back to Mr. Beck?

24 MR. DOUGLAS: Yes, Your Honor. The government would
25 just caution that the information came from Mr. Toebbe pursuant

1 to his plea agreement, his debrief information, and deserves
2 some protections which is why, you know, that probably also
3 shouldn't be gotten into. Also the way that the --

4 THE COURT: You can't get into the cover story?

5 MR. DOUGLAS: To ask him about his cover story when
6 he told us under a plea agreement? It was debrief information
7 that has protections under the guidelines. That just -- I'm
8 just -- I'm just --

9 THE COURT: Okay --

10 MR. DOUGLAS: I'm just letting the Court --

11 THE COURT: -- that's fair.

12 MR. DOUGLAS: -- know as matter of fact --

13 THE COURT: That's fair.

14 MR. DOUGLAS: -- it was debrief information. That's
15 all.

16 THE COURT: That's fair. And I think having these
17 letters before me and reading them in the same vein as I read
18 all jail correspondence both in years as a prosecutor and here
19 on the bench, I have a pretty good understanding, I believe, of
20 what the motivation was for the letters, what the intent was,
21 and whether or not Ms. Toebbe obstructed or not. So thank you,
22 Mr. Douglas. We're going to take you out of the hot seat,
23 Mr. Compton.

24 I think I have all I need, but I will entertain your
25 argument on the objection further, Mr. Beck, as far as you want

1 to go in the hope that for you and your hope, I guess, that you
2 can convince me otherwise.

3 MR. BECK: Well, Your Honor, I just have one more
4 point I'd like to make with regard to this issue. Even though
5 counsel -- and I understand counsel's concerns about saying too
6 much and the government's as well. There's -- I don't think
7 there's any dispute, and I think Mr. Compton did acknowledge
8 this was a preconceived plan by the parties. And the guideline
9 talks about influencing someone to commit perjury or
10 intimidating, threatening, or otherwise unlawfully influencing.

11 When I look at these letters, Your Honor, obviously, when
12 Mrs. Toebbe falsely stated in them that this was about a
13 bitcoin operation and that he had falsely told her it was, he,
14 if he had received them, would have immediately known that was
15 part of the plan because he knew that was not true. So --

16 THE COURT: But -- and she knew it was not true, yet
17 she says, "Tell the truth."

18 MR. BECK: Which that's the point I forgot to
19 mention, Your Honor. I'm not sure it's going to sway the
20 Court's decision, but her declarations of innocence at that
21 time are not obstruction of justice per the guidelines. So
22 that fact alone -- you know, if it wasn't for the fact that she
23 was communicating with him, I don't think we -- there would be
24 any arguments of obstruction of justice because under the
25 guidelines --

1 THE COURT: No. If she came in here before she pled
2 guilty and said, "I'm not guilty," that's her right. But what
3 she's done in a letter is encourage him to lie.

4 MR. BECK: Well, that was the point I was going to
5 make before I got sidetracked, Your Honor, and I apologize for
6 that. Is that how -- what I'm failing to understand is what
7 would her saying that I'm following the plan that you agreed to
8 and you already told me you were going to follow, how does that
9 influence him to do something he wasn't already going to do?
10 In other words, it wasn't --

11 THE COURT: People change their mind once they're
12 incarcerated and deals are being wheeled and dealt between
13 defense counsel and the government. Sometimes folks -- their
14 position changes, and they decide to save their own petard
15 instead of somebody else's, Mr. Beck. You know, maybe --

16 MR. BECK: I understand that, Your Honor.

17 THE COURT: -- she's just making sure -- sounds to me
18 as though she was just making sure he deployed the cover story
19 for her so she got out of this unscathed.

20 MR. BECK: Or she could be just letting him know she
21 was deploying the cover story which, again, I think is the
22 obvious --

23 THE COURT: Well, if she was doing it on her own, she
24 wouldn't have said, "Tell the truth."

25 MR. BECK: Which, again --

1 THE COURT: Which wasn't the truth.

2 MR. BECK: No. And he knew it wasn't the truth so
3 why -- you know, if it was a pure threat or an intimidation or
4 intent --

5 THE COURT: I think it's pressure. I don't see it as
6 a threat. It's pressure. She's pressuring him. It sucks in
7 here. I'm scared. Do it for the children. This is horrible.
8 I love you.

9 MR. BECK: Well, Your Honor --

10 THE COURT: We once had a note passed right up here
11 during the course of jury selection. I think that may have
12 been one of Mr. Compton's cases where we had --

13 Mr. Moss is raising a hand. He's taking -- he's not taking
14 credit for that. That was his case where the defendant slipped
15 it right to his codefendant, his baby mama, and it was
16 basically you -- I'm watching -- basically, I'm watching you.
17 You better tell the truth which wasn't the truth at all but
18 that happens --

19 MR. BECK: I know it happens, Your Honor.

20 THE COURT: -- right here in plain view.

21 MR. BECK: I just -- at least this is my experience.
22 The first time that I've ever had a case where the parties had
23 this plan before they ever got arrested.

24 THE COURT: This is the first time you'd had clients
25 that are confessed traitors; that they had covert operations;

1 that the whole offense was based in deceit and looking out for
2 their own selves -- if you believe the further story, their
3 family -- in committing these horrible acts against this
4 nation. But it's the first case because you never had clients
5 in a case such as this who were smarter than your average bear.
6 Well, actually, for all practical purposes, thought they were
7 smarter than your average bear but were not, and this is how
8 they do things: hide, deception, covert, hide the thumb drive
9 in the peanut butter sandwich, hide the note in the laundry
10 basket with a sock tied around it. It's -- yes, it's unusual.
11 This is an exceptional story. It's kind of one right out of
12 the movies. But it happened, and this is obstruction just like
13 your basic drug dealer who slips his baby mama a note that says
14 you'd better be telling the truth.

15 MR. BECK: Well, Your Honor, I think I've exhausted
16 all my arguments. I'll just make the final point, Your Honor.
17 The consequence of this, given that the letters were
18 preconceived, in my opinion, they weren't attempting to
19 influence him because he knew they were lies. He knew they
20 were lies. And it was her most likely telling her she was
21 going -- him he was going off the plan. They were sent early
22 on at a time when Mrs. Toebbe was --

23 THE COURT: Someplace she'd never been before.

24 MR. BECK: In hell to use her words. And I will tell
25 you to the Court that we had a heck of a time getting her on

1 the proper medications so that she could maintain her
2 psychological stability. She had been threatened, as she put
3 in the letter, by another inmate. And the letters were never
4 received by her husband, and they had no impact whatsoever on
5 the prosecution of this case.

6 THE COURT: But they impact -- they impact the
7 prosecution of the case if you look at it not in the long run
8 but in the middle because they had this plan to obstruct that
9 would have put the government off the trail of Mrs. Toebbe and
10 totally on the trail of Mr. Toebbe in the investigation and
11 perhaps even in preparation for the trial. Right?

12 MR. BECK: It was -- that was the plan, Your Honor,
13 but looking -- you know, this goes back to Application No. --
14 Note No. 1 where we're talking about these preconceived plans.
15 One of the elements in order for that to be considered
16 obstruction is that it be likely to thwart the prosecution.
17 Now, thwart, I don't know the exact definition of that, but
18 when I use it, it means likely to stop it. These folks weren't
19 going to stop this by this half-baked, cockamamie story that
20 they had created. The idea that the government was not going
21 to get Mrs. Toebbe or Mr. Toebbe because they came up with this
22 story. I know the government would have gotten them.

23 So just to finalize my point, Your Honor, it just seems to
24 me that in this case, because of the circumstances I've talked
25 about, enhancing her sentence by three levels, which in effect

1 adds three years -- or two levels -- adds three years to her
2 guideline -- minimum guideline range, just doesn't seem
3 appropriate. But that's all I have to say about it, Your
4 Honor.

5 THE COURT: Thank you, Mr. Beck.

6 Mr. Douglas, any response?

7 MR. DOUGLAS: No, Your Honor.

8 THE COURT: To this Court and I find that the
9 intention of these parties to establish a false narrative of
10 plausible deniability from Mrs. Toebbe was plainly calculated
11 to frustrate the investigation and prosecution of the offense
12 of conviction. Further, Ms. Toebbe's actions to prod
13 Mr. Toebbe to deploy their cover story while she was in jail,
14 her attempts at correspondence, they were all taken well after
15 the arrest and detention in this case.

16 She in her letter is basically encouraging him to deploy
17 the story, and she is basically telling him to lie. She says,
18 "Tell the truth," but we know it's not the truth. So basically
19 what she's saying is lie. Lie. Roll this lie out to save my
20 rear.

21 She made several attempts -- two that we know of -- to
22 induce Mr. Toebbe to plead guilty and provide statements to
23 authorities confirming her ignorance of his criminal scheme
24 which we know, because she's pled guilty now, was not his
25 criminal scheme. It was their criminal scheme. She made

1 repeated references to the children. The potential for her to
2 care for them. And she provided to Mr. Toebe basically in
3 these letters that if he pled guilty, she basically would get a
4 lesser sentence. She encouraged him to plead guilty so he
5 could be called as a witness in support of her efforts to
6 secure her own release from custody.

7 And nothing is clearer than in this letter where she knows
8 not -- knowing full well that it's not the truth where she
9 says, "Plead guilty. Tell them the truth." And she says
10 before that -- this is the whole sentence. And this is in the
11 initial December 21, '21 letter. "I may rot in here unless you
12 do what you are probably trying to avoid doing. Plead guilty.
13 Tell them the truth. I didn't know anything about any of
14 this."

15 So she feels as though maybe now he's incarcerated that
16 he's going to be backing out of the cover story, and she tries
17 to guilt him into staying with the cover story and deploying
18 that plan. That's obstruction plain and simple. It's a
19 different type of obstruction that we see in most of our normal
20 run-of-the-mill, for example, drug cases, but it's no different
21 really when you boil it down to it. It's encouraging a
22 codefendant to lie to save the other codefendant's rear.

23 And, therefore, I'm going to overrule the objection. The
24 presentence report will not be amended, but I'll note the
25 exception of the defendant to the Court's ruling here today.

1 Now, having this issue of obstruction come up in the
2 guideline calculations, counsel, in Mrs. Toebbe's case opened a
3 can of worms I'm afraid in this case with regard to the
4 guideline calculations and further calculation.

5 I'm going to give you the opportunity, Mr. Douglas, and
6 especially you, Mr. Beck, to present to the Court arguments on
7 why Mrs. Toebbe, based on this obstruction, shouldn't lose her
8 acceptance of responsibility. As I see it, she violated the
9 rules of the jail so that's nothing more than the
10 run-of-the-mill drug dealer in jail who is making the hooch in
11 the ceiling or selling drugs in the jail. Same as the -- or in
12 the same vein as an original offense that got them in there.
13 She's continuing these covert operations in the jail, and it
14 was obstructing. Why shouldn't she lose her acceptance of
15 responsibility for that?

16 Mr. Beck.

17 MR. BECK: Your Honor, the reason is, in my opinion
18 and our opinion, is that, again, those efforts occurred early
19 on in the case, they were ill-conceived, agreed, and after
20 that, Mrs. Toebbe told the truth. She accepted responsibility.
21 She has cooperated extensively. And she has left nothing on
22 the table as far as what her involvement in this offense was.
23 Should she have done what she did? No. But it has not in any
24 way impaired the prosecution of this case. In fact, she's done
25 everything she could to make the prosecution easier since doing

1 these things. So -- and I don't have the guideline section in
2 front of me, but -- well, under the --

3 THE COURT: 3E1.1.

4 MR. BECK: Yes. Under the objection 3C -- under the
5 Section 3C1.1, it does specifically talk about, Your Honor,
6 that there are cases where one could obstruct justice as this
7 Court has found but also accept responsibility and get credit
8 for that. And this seems to be the classic case where that
9 would fit. I mean, she did these things that she shouldn't
10 have done. Again, we -- you know, the Court does not accept
11 our explanation of why she did it, but she did them, and
12 subsequent to that, she did everything she could to accept
13 responsibility, Your Honor. So I don't -- it just seems this
14 is the classic case where you can have an obstruction and also
15 an acceptance of responsibility.

16 THE COURT: But in Application Note 4, which touches
17 on 3E1.1, it states there may be extraordinary cases in which
18 adjustments under both 3C1.1 and 3E1.1 may apply. What's
19 extraordinary about this?

20 MR. BECK: Well, I think it's extraordinary -- well,
21 two things. One, Your Honor, the conduct itself, albeit wrong,
22 had no impact on the case. So what is extraordinary in those
23 circumstances I think is subject to different definitions. But
24 after she did it, again, she pled guilty and extensively
25 cooperated. As the Court knows from our previous filings, this

1 is a case where, you know, everyone after fighting -- and in
2 her case, sending these letters where she didn't tell the
3 truth -- made an agreement and left the field shaking hands,
4 and at that point, she's done nothing but accept
5 responsibility. And it just seems -- you know, as the Court is
6 determined, she's going to get a two-level enhancement for
7 obstructing justice. If the Court were -- just thinking ahead,
8 if the Court were to rule that way, it might be a disincentive
9 for a lot of people not to plead because, you know, there are
10 people out there -- you know, I'm sure there are other cases --
11 maybe not quite as elaborate as this one -- where people do
12 things in the beginning of the case they should have done, but
13 then they enter a plea, and they get the credit for acceptance
14 of responsibility. So I just think this is a case where both
15 sections should apply.

16 THE COURT: Thank you, Mr. Beck.

17 Mr. Douglas.

18 MR. DOUGLAS: Your Honor, the government doesn't
19 believe and the government is not asking the Court to take
20 Diana Toebbe's acceptance of responsibility for some of the
21 same reasons that Mr. Beck has outlined.

22 Her conduct was early on in the case. She has pled guilty
23 twice -- twice in a timely manner that avoided any trial
24 preparation and, in fact, allowed us to focus on Mr. Toebbe's
25 cooperation which again -- I don't think it's a small matter --

1 the Department of Navy highly valued and allowed us to not
2 think, oh, she's still out there; we've got to focus on her and
3 getting her to plead guilty --

4 THE COURT: But that was --

5 MR. DOUGLAS: -- and not be able to go into him.

6 THE COURT: But that would support the government's
7 motion under 3E1.1(b) that can only be made if the Court gives
8 the defendant acceptance of responsibility under 3E1.1(a) in
9 the first place.

10 MR. DOUGLAS: Correct. Just --

11 THE COURT: So let's deal with in the first place.

12 MR. DOUGLAS: Okay. The prosecution is the victim of
13 this obstruction of justice -- right? -- because we're talking
14 about affecting the prosecution. So I'm trying to give the
15 Court the perspective that the prosecution had in this case and
16 how it actually worked.

17 THE COURT: Okay.

18 MR. DOUGLAS: She pled guilty and accepted
19 responsibility so we could then focus on him. Get his
20 cooperation which was very valuable to the Department of Navy.
21 Then she even did more than that by supplementing his
22 cooperation because there was a piece of information that he
23 said she had, and she gave us immediately, and it was extremely
24 helpful in assessing the scope of his conduct and any further
25 potential damage. So --

1 THE COURT: It just corroborated what he told you.

2 MR. DOUGLAS: No. I'm referring to the
3 cryptocurrency wallet passphrase that he said she had.

4 THE COURT: Uh-huh. But he said there's nothing in
5 that wallet; right?

6 MR. DOUGLAS: He did say there was nothing in that
7 wallet but --

8 THE COURT: And when she gave you the passphrase, he
9 was right.

10 MR. DOUGLAS: Yes, he -- yes, he was, Your Honor.
11 But if he says I don't have the passphrase, she has the
12 passphrase, and we never get the passphrase, we can never look
13 into the wallet and see if there's actually money in there.
14 And maybe he's lying to us, which is what we're trying to do is
15 corroborate what someone is telling us, and we're trying to get
16 into encrypted cryptocurrency wallets which we cannot otherwise
17 get into.

18 So the government does believe it's somewhat of an
19 extraordinary case where you do have this obstruction early on.
20 And, look, I've been a prosecutor for ten years. Right?
21 Prosecuted drug defendants. Okay. Then later moved on to
22 white collar, public corruption, civil rights. And those
23 aren't your typical hardened criminals; right? They do weird
24 things at the beginning. They have a lot harder time accepting
25 that they committed a crime.

1 THE COURT: Or accepting that it's going to stick.

2 MR. DOUGLAS: Accepting that it's going to stick.

3 I'm going to get out of this somehow. Okay. So this isn't
4 your typical drug case where you have a hardened criminal that
5 is engaging in this conduct. And that's just from my
6 perspective. Again, because we're talking about obstructing
7 the prosecution, I'm only trying to give the Court a full
8 picture from our point of view. And so for all those reasons,
9 we don't believe the Court should take her acceptance of
10 responsibility. Thank you, Your Honor.

11 THE COURT: Thank you, Mr. Douglas.

12 Looking at 3E1.1(a) of the guidelines, it states if the
13 defendant clearly demonstrates acceptance of responsibility for
14 his -- or in this case her -- offense, decrease the level --
15 the offense level by two levels. I don't find there was a
16 clear demonstrable acceptance of responsibility in this case
17 based on this defendant's actions.

18 And the application notes -- reviewing the application
19 notes which gives some guidance to this Court, those
20 application notes further support my finding. In looking at
21 number one, Application No. 1(a), it states in part, "A
22 defendant who falsely denies relevant conduct that the Court
23 determines to be true has acted in a manner inconsistent with
24 acceptance of responsibility."

25 She falsely denied her cooperation, her part of the

1 conspiracy in these letters, and she leaned on Mr. Toebe to
2 roll that false story out. She also, when looking at
3 Application Note 1(b), kind of falls to the contrary of that.
4 We see for acceptance of responsibility, there must be a
5 voluntary termination or withdraw from criminal conduct or
6 associations. So she's still not withdrawn but trying to fan
7 this cover story through these letters to Mr. Toebe.

8 And in addition to that, in addition to trying to roll out
9 part B of the conspiracy, the cover story, she's also
10 committing violations at the jail by secreting this
11 correspondence that she's not supposed to give to Mr. -- not
12 supposed to be sending to Mr. Toebe, and she knows that
13 because the beginning of the first letter says, "Flush this
14 when you get it."

15 Application Note 3 notes at the bottom, "A defendant who
16 enters a guilty plea is not entitled to an adjustment for
17 acceptance of responsibility under this section as a matter of
18 right." It notes that this evidence of acceptance of
19 responsibility basically may be outweighed by conduct of the
20 defendant that is inconsistent with such acceptance of
21 responsibility. And this certainly was.

22 And it also notes in Application Note 4, "Conduct resulting
23 in an enhancement under 3C1.1" -- the obstructing, which I've
24 already found -- "ordinarily indicates that the defendant has
25 not accepted responsibility for his criminal conduct."

1 Now, it does go on to say there may be extraordinary cases
2 in which adjustments under both obstructing and acceptance of
3 responsibility may apply, but this is not the case. And,
4 therefore, when I review the guideline calculations, I am not
5 going to give Ms. Toebbe a reduction for acceptance of
6 responsibility. I'll note the exception of the defendant and
7 the government to the Court's ruling in that regard.

8 I think we've reviewed all of the objections to the
9 presentence report. I have given counsel the opportunity to
10 argue with regard to the Court's position that the defendant
11 doesn't qualify for an acceptance of responsibility under
12 Guideline 3E1.1(a) which then does not give the government the
13 opportunity to request another one-level reduction under
14 3E1.1(b).

15 And I don't think that leaves anything further before we
16 get to the guideline calculations, does it, Mr. Douglas?

17 MR. DOUGLAS: No, Your Honor.

18 THE COURT: Mr. Beck?

19 MR. BECK: No, Your Honor.

20 THE COURT: The presentence report is going to be
21 accepted and ordered filed and made a part of the record
22 herein. It will be placed in the record under seal. In the
23 event of an appeal of the sentence imposed herein, counsel on
24 appeal will be permitted access to the sealed report, but not,
25 however, to the recommendation section from probation.

1 I will note for the record in this case that, to back up,
2 on September 27, 2022, this defendant appeared in the United
3 States Magistrate Court for the Northern District of
4 West Virginia sitting in Martinsburg. And at that time, she
5 tendered a plea of guilty by a written plea agreement to
6 Count 1 of the indictment charging conspiracy to communicate
7 restricted data. After consideration, the Court accepted the
8 defendant's plea of guilty to the crime charged in Count 1 and
9 deferred acceptance of the plea agreement and adjudging the
10 defendant guilty.

11 Subsequent to acceptance of the guilty plea, a presentence
12 investigation report was ordered. Having now received and
13 reviewed that report and ruled upon any factual and legal
14 issues raised thereby, I find the charge to which Ms. Toebbe is
15 pleading adequately reflects the seriousness of the offense
16 behavior. I also find that acceptance of her plea agreement
17 will not undermine the statutory purposes of sentencing which
18 are deterrence, incapacitation, just punishment, and
19 rehabilitation.

20 So at this time, Ms. Toebbe, I accept your plea agreement
21 and your plea of guilty, and you now stand convicted of the
22 offense to which you pled guilty under your agreement with the
23 government.

24 I'll now announce my tentative findings as to the
25 applicable guidelines. We start in this case with a base

1 offense level of 37 pursuant to Guideline 2M3.1(a)(2). Then,
2 as we've discussed upon the record, pursuant to Guideline
3 3C1.1, two levels are added for obstructing or impeding the
4 administration of justice. Here the Court considered it as
5 obstructing. That brings us to an adjusted offense level of
6 39.

7 Defendant has a criminal history category of one based upon
8 zero points. With a criminal history category of 1 and a total
9 offense level of 39, the guidelines recommend imprisonment in
10 the range of 262 to 327 months. I'll note that the binding
11 plea in this case, which the Court has accepted, has a binding
12 term that the defendant cannot be sentenced any higher than the
13 bottom or the lowest number of the applicable guideline range.
14 So we're at 262 max on this.

15 The guidelines also recommend supervised release in the
16 range of two to five years; indicate defendant is ineligible
17 for probation; a fine in the range of 40,000 to \$100,000. And
18 there is a special assessment fee in the amount of \$100 owed on
19 that one felony count of conviction. The cost of imprisonment
20 is \$3,688 per month, the cost of community confinement is
21 \$2,980 per month, and the cost of supervision is \$371 per
22 month.

23 Other than the objections we reviewed at the -- at an
24 earlier time in this proceeding, are there any objections to
25 the tentative guideline findings, counsel?

1 MR. DOUGLAS: No, Your Honor.

2 MR. BECK: No, Your Honor.

3 THE COURT: Then the guidelines as announced will be
4 the advisory guidelines applicable to sentencing in this
5 matter.

6 Mr. DeHaven?

7 MR. DEHAVEN: Your Honor, I believe the applicable
8 guideline fine for offense level 39 would be \$50,000.

9 THE COURT: Oh, thank you. So I stand corrected.
10 Then the applicable guideline fine is in the range of 50,000 to
11 \$100,000.

12 Any objection to that, counsel?

13 MR. DOUGLAS: No, Your Honor.

14 MR. BECK: No, Your Honor.

15 THE COURT: Okay. Mr. Beck, I will recognize you for
16 argument on your motion for a variant sentence and also any
17 other additional factors that which you believe I should
18 consider today in my decision on what sentence should be
19 imposed.

20 MR. BECK: Thank you, Your Honor.

21 Your Honor, the sentence that Mrs. Toebbe would receive
22 under this plea agreement if the Court were to follow the
23 guidelines or at least the low end of the guidelines is now 262
24 months. Of course, the guidelines are not the only factor that
25 the Court must consider in determining what her sentence should

1 be.

2 The number one factor listed under the statute is the
3 nature of the offense and the seriousness of the offense and
4 then the characteristics of the defendant. Obviously, this is
5 a serious offense. The Court has made that very clear. And
6 they need to be made clear because everyone understands it was
7 a serious offense, and I understand why the Court made that
8 statement. But what I think the Court should also take into
9 consideration with regard to Mrs. Toebbe is that this was not a
10 crime that she committed at her insistence. It was one that
11 was initiated by her husband. Her husband was the principal
12 actor here. He's the one that had the position with the United
13 States government where he could get access to the information,
14 understood its significance and remove it, and then know how to
15 market it, so to speak, to the people who might be interested.

16 Mrs. Toebbe was a housewife, a teacher with a liberal arts
17 degree, and had no knowledge of what this stuff meant.
18 Obviously, she knew it was something that she shouldn't have
19 been involved in trying to transmit. But she did not steal it,
20 nor did she abuse the position of trust with the government,
21 nor did she communicate with any foreign government.

22 My point, Your Honor, is that all of the essential elements
23 of this offense, ones that were absolutely critical to it being
24 committed, were done by her husband.

25 THE COURT: Couldn't you look at it as though she had

1 the plan, and he had the access?

2 MR. BECK: I'm sorry, Your Honor?

3 THE COURT: Couldn't you also -- an alternative view
4 of that is she had the plan or was 50/50 part of the plan, and
5 he just had the access?

6 MR. BECK: I don't think that's what the -- and I
7 don't want to get out of line here as far as classified, but I
8 don't think that there's been any evidence that this was a plan
9 that originated from anyone other than Mr. Toebbe.

10 THE COURT: Well, in the end, does it really matter?
11 Because she's a principal in the first degree as well. In for
12 a penny, in for a pound.

13 MR. BECK: I think it matters to the extent of, Your
14 Honor, when you talk about her culpability. These would be
15 Mr. Toebbe and her role in the offense. She is more of an
16 accomplice than a principal in my mind. She did help him. She
17 went on three of these dead drops. But, again, none of this
18 would have happened without her husband being in the position
19 he was, and I believe, from what I've heard, come up with the
20 idea to do this.

21 Now, secondly, Your Honor, the Court has to consider under
22 the statute the histories and characteristics of Mrs. Toebbe.
23 Those are important factors. As you point out, she has no
24 criminal history. She has no history other than having been a
25 school teacher, an educated person, a housewife, a mother, and

1 had never been in any kind of criminal involvement her entire
2 life.

3 What the Court also knows by virtue of our filings is that
4 she is someone who for many years, up to 25 years I think, has
5 suffered from serious mental illnesses. And that's documented
6 by the report we submitted from her -- well, not report, but
7 from the notes we submitted from her treating physicians that
8 were contemporaneous to her seeking help for her problems and
9 also from the psychological evaluation that we obtained in
10 connection with this case.

11 THE COURT: But there was no mental defense to
12 this --

13 MR. BECK: No, there is no defense, Your Honor. I'm
14 not suggesting in any way that she had the inability to
15 understand the wrongfulness of her conduct.

16 However, what I do think is important to note is -- and
17 this is documented in all the records we submitted -- that the
18 scheme to do what they did, culminated or originated or came to
19 fruition at or about the time these psychological problems were
20 at an apex for Mrs. Toebbe. There are records indicating that
21 at around 2016, 2017, when I think this scheme began, she was
22 suicidal, had to be taken to the hospital on multiple occasions
23 for suicide risk, and was in a deep, deep dark depression. And
24 that depression and that anxiety, albeit not something that
25 would amount to a defense to her crime, one cannot help but

1 think that it clouded her judgment here in a way that is -- it
2 had an effect on her in a way that it would not -- a normal
3 person without those problems would not have had. A normal
4 person without those problems hopefully would have been able to
5 react differently.

6 And the other thing I would point out, Your Honor, because
7 it's been discussed that, yes, the issue here was greed. There
8 was an effort to get money which is the definition of greed.
9 And looking at these previous espionage cases that have
10 occurred in other jurisdictions, it appears to me that that
11 greed really amounts or arises from the traditional purposes of
12 someone being greedy. Trying to buy a big house. Trying to
13 have lots of money and have cars and so forth. Here there was
14 a desire to get money, but going back to what the Court said,
15 if you look at those emails that were captured by the
16 government between Mrs. Toebbe and her husband, she genuinely
17 had a tremendous amount of emotional, psychological distress,
18 and she was unwell because of her -- you know, some might
19 say -- some people might disagree with this. Some would say
20 maybe it was genuine or maybe it was something she should have
21 had, but she thought the country was going down the tubes. And
22 you look at those emails, there is no question that that's what
23 she thought. She was --

24 THE COURT: So she was going to further send it down
25 the tubes by --

1 MR. BECK: Well --

2 THE COURT: -- helping her husband share secrets that
3 go to the very heart of this country much less our allies'
4 defense?

5 MR. BECK: Well, that's how -- that's how --

6 THE COURT: So she wanted to put the final torpedo in
7 it?

8 MR. BECK: Well, no. I think her goal was to get
9 out. And I think that -- you know --

10 THE COURT: But burn the whole place down in the
11 process?

12 MR. BECK: Well, it wasn't a rational decision, Your
13 Honor. I guess that's my point, Your Honor, is she was so
14 obsessed with this. She was also clearly operating under a
15 significant mental illness that caused her to be at a point of
16 suicide before -- you know, before this stuff even happened.

17 And as I pointed out in one of our memos, there were other
18 reasons. Her family was in kind of a falling apart situation.
19 So it was just the perfect storm it seems to me where she made
20 a bad decision that she may not have made had she not been
21 suffering from all these problems.

22 Moving on, Your Honor, one of the other factors the Court
23 has to consider is the risk of recidivism. Mrs. Toebbe, again,
24 never committed a crime that we know of before this. She
25 doesn't have any kind of knowledge regarding nuclear submarines

1 or anything else that would allow her to get out of jail one
2 day and suddenly become an agent for a foreign government.

3 The government has extensively researched the prospect that
4 there may be other monies or information out there that
5 Mr. Toebbe and Mrs. Toebbe had, and they've come to the
6 conclusion with high confidence that there's nothing else out
7 there that she could ever get her hands on even if she knew
8 where it was. So there's little, if any, harm that she will
9 ever do anything, much less something like this again.

10 THE COURT: How do we know that if they had the
11 Plan B cover story, there is not a Plan C where something else
12 is secreted for when they get out that they can share and make
13 money from?

14 MR. BECK: All I can say, Your Honor, is --

15 THE COURT: They're not trustworthy based upon the
16 offenses they committed and their covert actions both outside
17 for both of them and then in the jail for Ms. Toebbe. So how
18 can the Court be assured there's not a Plan C, the get-up plan
19 for when they're released from incarceration?

20 MR. BECK: I think the way the Court can be assured
21 is what the government has done. They have --

22 THE COURT: Take them at their word?

23 MR. BECK: Well, and I think they have done
24 everything they know how to do to confirm that there is no
25 further information out there. And I would also suggest to the

1 Court that Mrs. Toebe because of her lack of knowledge about
2 this, she wouldn't know what to do with it if it were.

3 THE COURT: But she may know where it's buried.

4 MR. BECK: Pardon me?

5 THE COURT: She may know where it's buried,
6 figuratively.

7 MR. BECK: If it were, but there isn't -- at least
8 according to the government, they have a high degree of
9 confidence there's not.

10 The last thing, Your Honor, with -- or not last thing but
11 one other point I want to make with regard to the guidelines,
12 Your Honor, which you've calculated, is if you look at
13 Guideline 2M3.1, which is the relevant guideline that we're
14 dealing with here, as you know, it really has two levels -- and
15 if the Court will bear with me a second, I left something over
16 here. It has the level that if you are involved in espionage
17 involving top secret information, which doesn't apply in this
18 case, and it has the level 37, which is 5 levels lower than the
19 top secret if it's other information.

20 And what I find hard to understand, Your Honor, in the
21 guideline is, as the Court knows, the government uses in
22 general three levels of classification: top secret, secret,
23 and confidential. And the guideline says that the level of the
24 guideline is geared towards the significance of harm that would
25 be caused if the information is not kept confidential or is

1 disclosed, but it only distinguishes between top secret and
2 other. And the reason I find that hard to understand, Your
3 Honor, if you look at -- and I think this is the accepted
4 definition across the government as to what constitutes
5 classified information. Top secret is defined as information
6 that would be reasonably expected to cause exceptionally grave
7 damage to the national security. And I'm reading from 18 CFR
8 § 3a.11. Secret information is information that reasonably be
9 expected to cause serious damage to the national security. And
10 then confidential information is defined as could reasonably be
11 expected to cause damage.

12 So then clearly, at least in the government regulations and
13 under the government definitions of concerned classification,
14 there's a major distinction between those three categories.
15 Yet, the guideline, itself, makes no distinction between secret
16 and confidential. In other words, there's no five-level drop
17 down from secret to confidential. And the reason that's
18 important in this case, Your Honor, is that all of the
19 information that Mr. Toebbe secreted from his place of work and
20 all the information that they attempted to transmit, neither
21 fell into the top secret or secret category. It was all
22 confidential.

23 So it just seems to me that the Court in measuring
24 whether -- what the appropriate sentence is here, it should
25 consider that this guideline totally ignores that distinction.

1 Even though in the guideline itself, Your Honor, again, it says
2 that the guideline is based on what harm would be caused by the
3 release of the information.

4 Moving on, Your Honor --

5 THE COURT: Well, doesn't -- remember the first
6 letter we had from Admiral Houston? A six-page letter and no
7 matter what you call it, this -- your client put this country
8 in grave danger. Just looking at a couple of the many things I
9 highlighted in this letter in preparation for my consideration
10 of whether to accept the original plea agreement, this admiral
11 concluded that Mr. Toebbe's actions continue to have a lasting
12 and serious impact on our national defense. He captured some
13 of most secure and sensitive information about our
14 nuclear-powered fleet. A critical component of national
15 defense has been irreparably compromised in the admiral's
16 words.

17 He stated that the Toebbes' illegal conduct now threatens
18 critical military advantages because the nation spent billions
19 of dollars developing naval nuclear propulsion technology and
20 now the integrity of this protected information was
21 compromised, undercutting the military advantage afforded by
22 decades of research and development. That information provided
23 could provide foreign navies the opportunity to close the gap
24 in capabilities which would require an extraordinary effort and
25 resources to restore. The Navy must operate on the assumption

1 Mr. Toebbe's actions resulted in information falling into the
2 possession of other entities and persons who wish to use it to
3 damage the U.S.

4 So no matter what you call it -- top secret, restricted --
5 the harm to this nation is grave, and these are scary times we
6 live in.

7 MR. BECK: And I'm not arguing that, Your Honor. I'm
8 just saying that it wasn't top secret which, again, designates
9 something that even would cause extreme -- I mean under their
10 own definitions, it would cause extreme danger versus secret
11 that's likely to cause grave danger and confidential which is
12 likely to cause danger.

13 Regardless of what the admiral said, and I certainly don't
14 disagree with him, this information fell into neither one of
15 those more serious categories. It fell into a serious
16 category, but one that's not taken into account under this
17 guideline. And that's the part I don't understand, Your Honor.
18 It seems to me that if a guideline is going to be based on the
19 danger that's caused by the release of this information, there
20 should be some distinction between class -- confidential versus
21 secret. That's my point, Your Honor. I'm not saying that it
22 wasn't harmful information that should have -- that could cause
23 harm to the U.S.

24 Your Honor, the final point that I would like to make is
25 that ultimately the Court has to decide what is a reasonable

1 sentence in this case because that's what the law requires.
2 And this goes back to what we talked about early on in this
3 hearing is we have tried to provide the Court with a greater
4 perspective on what is considered reasonable in these kind of
5 cases, Your Honor.

6 Ms. Carmichael and I have listed a number of cases that
7 have come in the past -- that occurred in the past where people
8 were accused of espionage. They weren't accused of the
9 specific offense in this case which is under the nuclear
10 statute, but they were all engaged in the same kind of
11 activity, and that is trying to sell secrets they shouldn't
12 have been selling.

13 The list of cases that we provided, Your Honor, indicate
14 that even principals -- people that were what we would say like
15 Mr. Toebbe, ones who were connected to the government and got
16 the information -- rarely receive sentences that would be
17 within this guideline range that the Court has adopted.

18 The other point we would make, Your Honor, is that with
19 regard to the accomplices, which we would characterize
20 Mrs. Toebbe, there are a number of people who have received
21 lesser sentences than what we had originally asked for when we
22 came before the Court.

23 The point being, Your Honor -- and one I just want to bring
24 to the Court's attention because I think it really highlights
25 the point I'm trying to make or we're trying to make is if you

1 -- there's a fellow named Ron Rockwell who was prosecuted in
2 Utah back in '06, pled in 2019. He was an army officer who
3 spoke Chinese and Russian. He went to -- retired and then went
4 to work for a defense intelligence agency. And he started
5 selling Chinese folks, intelligence agents, classified
6 information. He was arrested while he was trying to go to
7 China to sell some, and he received a sentence of 120 months.

8 Mrs. Toebbe, again, is nothing like that. She was an --

9 THE COURT: What type of classified information was
10 it?

11 MR. BECK: I'm sorry, Your Honor?

12 THE COURT: What type of classified information was
13 it?

14 MR. BECK: I do not know, Your Honor.

15 THE COURT: Please continue.

16 MR. BECK: The other point I want to make, Your
17 Honor, is this. Well, going back to the accomplices. The ones
18 that we were able to find that we presented to the Court, their
19 sentences ranged anywhere from 63 to 41 to 12 -- these are the
20 sentences -- to 81 and 60 months. In each one of those cases,
21 one could make the argument that the conduct of those
22 accomplices was even more egregious than Mrs. Toebbe's conduct,
23 yet they received sentences that are far below what the
24 projected guideline is in this case.

25 And then lastly, Your Honor, I think it's significant that

1 there is actually a DOD study out there that we found that
2 looked at prosecution of espionage cases over the years.
3 That's Table 8 in our memo. And it looked at all kinds of
4 espionage, but the bulk of it, as we understand it, are the
5 classic espionage cases. Not the kind where people leak to a
6 newspaper to get some -- it's a classic espionage like here.
7 And if you look at the prosecutions in the last -- well, from
8 1990 to 2015, most of those people, 42 percent of them,
9 received a sentence of below 5 years. From 1.1 years to 4.9
10 years. And then if you even -- if you look at people that
11 received less than 10 years, it's actually 66 percent of the
12 people received less than 10 years for this crime.

13 So we just ask the Court to consider that in context of the
14 requirement that the Court take into consideration disparity of
15 sentencing as part of the equation here along with all the
16 other factors of course. That a sentence of -- in the
17 guidelines would be far in excess of what apparently is the
18 usual sentence in these cases and a sentence that's far in
19 excess of sentences that are imposed for people that do far
20 more than Mrs. Toebbe did, even principals.

21 So for all those reasons, Your Honor, we would respectfully
22 request that the Court impose a sentence consistent with the
23 bulk of sentences that have been imposed in these cases in the
24 last -- or at least between 1990 and 2015, and that would put
25 us in the range of 3 to 4.9 years. Thank you, Your Honor.

1 THE COURT: Thank you, Mr. Beck.

2 Mrs. Toebbe, you have the right to make a statement before
3 you're sentenced. Do you desire to make a statement?

4 DEFENDANT DIANA TOEBBE: Yes, I do.

5 THE COURT: All right. If you'll come on up to the
6 podium, please.

7 DEFENDANT DIANA TOEBBE: I made a catastrophic
8 decision. Initially, I should have followed my instinct and
9 tried harder to talk my husband out of this plan, but then my
10 family's difficulties continued, my depression was at an
11 all-time high, and I felt like the country's political
12 situation was dire.

13 I didn't just fail to talk him out of it. I actually
14 participated in helping him, and I wanted him to succeed. At
15 the time, I absurdly thought it was a way out of these
16 struggles, but this is inexcusable no matter what my family and
17 my country or I were going through at the time, and I deeply
18 regret every minute of it.

19 There are so many things I didn't think of then, but I'm
20 acutely aware of now. I didn't think through what the impact
21 of my actions might have been on our servicemen and women. I
22 was enticed by financial gain and the freedom that might have
23 come with it, and I ignored the very real harm that I might
24 have caused to those who fight for the freedom I have or had.

25 I didn't think of my mother and father who did not raise me

1 to act this way, who both taught and fostered my independence
2 while at the same time, instilling principals in me that I
3 betrayed. After having spent decades of their lives raising
4 their children, they're now spending their retirement years
5 raising a grandchild. I didn't think of my brother and
6 sister-in-law who, though money is tight, have bent over
7 backwards to take in my younger son. I am beyond grateful to
8 all of them and so ashamed that I have made their lives so much
9 more complicated.

10 I didn't think of my children who have suffered the most in
11 this situation of my making. I am now unable to provide the
12 support they need, and however well cared for they are now,
13 they deserve their mom and dad. Their lives will be forever
14 marked by the decision I made. There isn't a word for the
15 regret I feel.

16 My path forward will be rededicated to living life as I
17 know it should have been lived, to being an honest, hardworking
18 member of my community, and to being a mother and daughter. I
19 will continue to seek mental help -- mental health support
20 through my professionals. I plan to pursue a nursing career
21 after my period of incarceration as a way of providing --
22 contributing positively to others in my community. I ask for
23 the chance to be able to go back to the person I once was and
24 the person I know I can be again.

25 THE COURT: Thank you, Mrs. Toebbe.

1 Mr. Douglas.

2 MR. DOUGLAS: Thank you, Your Honor.

3 Your Honor, in considering the 3553(a) factors, first of
4 all, starting with the seriousness of the offense. It's
5 universally accepted that the person with access, the person
6 who is trusted, the person who has the specialized knowledge of
7 the classified information should be punished more severely
8 than someone who might have helped in some way. For example,
9 as a lookout.

10 Secondly, as Mr. Beck started to allude to, this will be a
11 disparity. If the Court sentences Mrs. Toebe to the low end
12 of this range or even half the low end of this range, it will
13 be a disparity so the question becomes is there a basis for
14 such a disparity?

15 THE COURT: Let's back up.

16 MR. DOUGLAS: Yeah.

17 THE COURT: First of all, the lookout.

18 MR. DOUGLAS: Yeah.

19 THE COURT: If you had a defendant who was a lookout
20 let's say at a bank robbery -- let's say something that's
21 really bad inside, and there's a real danger to the folks
22 inside because someone is shot or folks are killed. That
23 lookout would -- should get a lesser sentence than the person
24 who went into the bank armed just because a lookout was sitting
25 in the car waiting for the robber with the gun to come out with

1 the bag of money?

2 MR. DOUGLAS: Completely different situation. This
3 isn't a drug case. This isn't a bank robbery. This isn't a
4 murder for hire. This is an espionage case. And so --

5 THE COURT: That put the -- that put this country in
6 grave danger.

7 MR. DOUGLAS: Correct. However, the point is, as has
8 been accepted by several courts across this land, acts as
9 should be punished more severely, period. And it's logical.
10 The person who had -- it couldn't have been committed without
11 him.

12 THE COURT: It would have -- his guidelines would
13 have been more severe or higher than hers had she not
14 obstructed and not accept -- and failed to accept
15 responsibility.

16 MR. DOUGLAS: Under the --

17 THE COURT: Right?

18 MR. DOUGLAS: Under the application of the
19 guidelines, yes.

20 THE COURT: Correct.

21 MR. DOUGLAS: Still, in the government's opinion, she
22 accepted responsibility and she cooperated. And now she's
23 facing ten more years for two letters that --

24 THE COURT: You find that laughable?

25 MR. DOUGLAS: -- did not -- did not make it to the

1 defendant --

2 THE COURT: You find that laughable, Mr. Douglas?

3 MR. DOUGLAS: It had no effect.

4 THE COURT: No, my question is, do you find that
5 laughable?

6 MR. DOUGLAS: I find it to be under the application
7 of the 3553 factors excessive to go ten years on top of a
8 sentence for two letters that did not make it to the recipient
9 and had no effect on the case.

10 There's also a disparity, Your Honor, from some of the
11 worst cases. The worst cases are human asset, human
12 intelligence cases where you're literally naming people out
13 there that are supposed to remain secret and putting their
14 lives specifically at risk. In fact, Peter Debbins, who got
15 188 months in such a case; Mariam Thompson recently, 276
16 months; Jerry Lee, 228 months. These are people who had
17 access, had been trusted, broke that trust in the worst way in
18 giving HUMINT assets and putting them at risk.

19 We ask the Court to consider --

20 THE COURT: But that's not the guideline range on the
21 plea that you've given Mr. Toebbe; right?

22 MR. DOUGLAS: Your Honor, I'm attempting to contrast
23 what Mrs. Toebbe is facing, the 262 months at the low end --

24 THE COURT: Okay. So not exactly as opposed to her
25 husband but as opposed to these other defendants who have been

1 sentenced --

2 MR. DOUGLAS: Correct, Your Honor.

3 THE COURT: -- in other courts?

4 MR. DOUGLAS: As opposed to others who had access in
5 these cases with human intelligence.

6 We ask the Court to consider, again, the cooperation of
7 this defendant which we've asked multiple times for the Court
8 to consider. The FBI and the Department of Navy are uniquely
9 positioned to assess this cooperation, and they're the ones who
10 benefit from incentivizing cooperation.

11 Your Honor, there is no evidence of a Plan C, full stop.
12 This was not a fly-by-night investigation conducted by
13 amateurs. This was the Federal Bureau of Investigation. We're
14 talking about an entire squad from the FBI Field Office in
15 Pittsburgh comprised of numerous agents and analysts. They
16 received support from several field offices across the entire
17 country, including the Baltimore Field Office, the Washington
18 Field Office, headquarter support, support from Quantico. They
19 also had support from the NCIS in this case.

20 It was an extensive investigation. It included three dozen
21 search warrants across multiple districts. We searched
22 electronic devices, electronic accounts. We searched their
23 residence. We searched their vehicles. We searched his Naval
24 Reactors office. We searched his satellite office on the
25 campus of the Naval Academy. We also obtained search warrants

1 for location information on their cell phones. We also
2 obtained a search warrant to place a tracking device on
3 Mr. Toebbe's vehicle they traveled to and from work. We had
4 the GPS information on their phones for several months. We had
5 the tracker on his car for several -- for a couple of weeks.
6 And there just is no evidence that there was some other
7 location that he was -- could be storing something.

8 Then we meet with him for over 20 hours, and he gives us
9 access to his heavily-encrypted laptop. And it's clear from
10 the review of the laptop, it was the universal laptop that
11 contained all of the restricted data that he had been
12 referencing in the letters that he was dropping at the sites.
13 So there is no evidence that there is some type of Plan C. In
14 fact, all of the evidence goes against such a conclusion.

15 THE COURT: So are you saying all this not to
16 complain about the Court's calculation of the guidelines again
17 but to tell me that you in some way agree with the motion for
18 variant sentence? Is that where this is going?

19 MR. DOUGLAS: The way I see it, Your Honor, is that I
20 should make sure the Court hears from the government when it
21 states its concern about there being a Plan C on I think now
22 the third occasion. That I should speak to that and because it
23 does go to -- if the Court is mentioning it multiple times, it
24 must be considering it important.

25 THE COURT: Yes.

1 MR. DOUGLAS: And I'm just trying to --

2 THE COURT: So you're giving me a full disclosure on
3 what you believe the facts are?

4 MR. DOUGLAS: Yes, Your Honor.

5 THE COURT: Okay. I appreciate that.

6 MR. DOUGLAS: So that the concern should not be as
7 high as the Court has stated in considering the 3553(a)
8 factors.

9 Ultimately, Your Honor, the government is not going to give
10 a new recommendation. It stands by its previous
11 recommendation, but it does believe that this should not --
12 this is not a case for such a disparity.

13 THE COURT: So the government is opposing the motion
14 for variant sentence --

15 MR. DOUGLAS: No.

16 THE COURT: -- and asking me to sentence this
17 defendant to the low -- to the low end of the applicable
18 guideline which is the heart of the plea agreement in this --
19 is we start at the low end of the guideline, 262, because the
20 agreement was no higher than the applicable low end. So I'm
21 not certain I understand what you're saying. Are you saying
22 that you're asking the Court to impose a sentence of 262 or are
23 you asking the Court in joining in the defendant's motion for
24 variant sentence that you suggest a different number?

25 MR. DOUGLAS: The government is taking no further

1 position than it did in the August 16th sentencing hearing
2 where the three years was on the table.

3 THE COURT: So the government is asking me to grant
4 the motion for variant sentence and not sentence this defendant
5 to any more than 36 months, 3 years?

6 MR. DOUGLAS: Yes, Your Honor.

7 THE COURT: Why would I do that when that's the very
8 heart of the basis for why I rejected the plea agreement
9 itself, the original plea agreement, in Ms. Toebbe's case?

10 MR. DOUGLAS: For all the reasons we've previously
11 stated, Your Honor.

12 THE COURT: Okay. Recite them again.

13 MR. DOUGLAS: The seriousness of the offense. She is
14 not the person with access. The disparity that this would
15 create for someone who was simply a lookout on two or three
16 occasions, because of her cooperation, because there is no
17 concern about there being a Plan C. And for all those reasons
18 under 3553(a), this should not be a sentence anywhere near 262
19 months.

20 THE COURT: And you're asking me to sentence her to 3
21 years, 36 months?

22 MR. DOUGLAS: Yes, Your Honor.

23 THE COURT: Thank you, Mr. Douglas.

24 MR. DOUGLAS: Thank you, Your Honor.

25 THE COURT: We're going to take a break while I

1 further consider the arguments I've heard at disposition, and
2 then we'll get back here as soon as I have reached a decision,
3 counsel, to place the ruling upon the record and impose
4 sentence.

5 (Recess 1:00 P.M. - 1:45 P.M.)

6 THE COURT: Please be seated, everyone. We're back
7 on the record. The defendants and their counsel are here
8 present.

9 Counsel, anything further for me to consider before I
10 impose sentence?

11 MR. DOUGLAS: Not by the government, Your Honor.

12 MR. BECK: Not from Mrs. Toebbe, Your Honor.

13 THE COURT: All right. Ms. Toebbe, please stand.

14 Pursuant to the Sentencing Reform Act of 1984, it's the
15 judgment of this Court that the defendant, Diana Toebbe, is
16 hereby committed to the custody of the Bureau of Prisons to be
17 imprisoned for a term of 262 months. You may have a seat.

18 The Court makes the following recommendations to the Bureau
19 of Prisons: That the defendant be incarcerated at an FCI or
20 facility as close to San Diego, California, as possible; that
21 she be incarcerated at a facility where she can participate in
22 substance abuse treatment as determined by the Bureau of
23 Prisons; that she be incarcerated at a facility where she can
24 participate in the 500-Hour Residential Drug Abuse Treatment
25 Program; that she be incarcerated at a facility where she can

1 participate in mental health treatment as determined by the
2 Bureau of Prisons; that the defendant be given credit for time
3 served since October 9, 2021.

4 Pursuant to 42 U.S.C. § 14135a, the defendant shall submit
5 to DNA collection while incarcerated in the Bureau of Prisons
6 or at the direction of the probation officer. Upon release
7 from imprisonment, Ms. Toebbe, you shall be placed on
8 supervised release for a term of three years.

9 You must comply with the standard conditions that have been
10 adopted by this Court in its November 29, 2016, standing order
11 as well as the following special conditions: You must
12 participate in a mental health treatment program and follow the
13 rules and regulations of that program. The probation officer
14 in consultation with the treatment provider will supervise your
15 participation in the program. That includes the provider, the
16 location, the modality, the duration, the intensity, et cetera.

17 You must participate in a substance abuse treatment
18 program. The probation officer will supervise your
19 participation in that program, meaning supervising the
20 provider, the location, the modality, the duration, and the
21 intensity. You must submit to substance abuse testing to
22 determine if you used a prohibited substance, and you must not
23 attempt to obstruct or tamper with the testing methods. All of
24 these conditions assist probation in identifying treatment
25 needs, providing rehabilitation services, reducing the risk of

1 recidivism, and provide for protection of the community.

2 You must not use or possess alcohol. This condition
3 assists probation in reducing the risk of recidivism and
4 provides for protection of the community.

5 You must provide the probation officer with access to any
6 requested financial information and authorize the release of
7 any financial information. The probation officer may share
8 financial information with the U.S. Attorney's Office. This
9 condition assists the probation office in legitimizing
10 defendant's employment and/or income, provides protection for
11 the community, and aids in the maximum collection of financial
12 penalties.

13 You must not engage in an occupation, business, profession,
14 or volunteer activity that would require or enable you to have
15 access to classified government information without prior
16 approval of the Court. Unless excused for legitimate reasons,
17 if not in compliance with the condition of supervision
18 requiring full-time employment at a lawful occupation, you may
19 be required to perform up to 20 hours of community service per
20 week until employed as approved or directed by the probation
21 officer. This condition assists probation in reducing the risk
22 of recidivism and provides for protection of the community.

23 You must consent to a third-party disclosure to your
24 employer in regard to your convictions. This condition will
25 assist probation in monitoring defendant's compliance with the

1 conditions of supervision, providing for protection of the
2 community, and reducing the risk of recidivism.

3 It's further ordered you pay the United States a \$100
4 special assessment fee as to Count 1 which I note has been paid
5 in full. It's further ordered that you shall pay a fine in the
6 amount of \$50,000. This takes into account the fact that the
7 Court cannot order restitution to recover the remaining
8 basically \$45,700 of earnest money that had not been recovered
9 by the government.

10 Additionally, the defendant agrees to forfeit and abandon
11 to the United States all of her right, title, and interest in
12 the following items that the defendant agrees constitute money,
13 property, and/or assets derived from or obtained by the
14 defendant as a result of or used to facilitate the commission
15 of her illegal activities. Those are all papers, digital
16 media, electronic devices seized from her residence, her
17 vehicles, and Mr. Toebbe's Naval Reactor's offices in
18 October 2021.

19 Before I get into the specifics for the reasons for this
20 sentence imposed -- and I will say in imposing this sentence,
21 in determining what the proper sentence to be imposed was, I
22 did consider all those factors set forth in 18 U.S.C.
23 § 3553(a).

24 I did consider the arguments of defense counsel and the
25 government to support the defendant's motion for variant

1 sentence in this case. The defendant asking for the Court to
2 vary downward to a sentence of 3 to 4.9 years and the
3 government asking the Court to vary downward to a sentence of
4 3 years.

5 Now, while the factors listed in mitigation by the
6 government and the defendant do impact the Court's sentencing
7 and did impact the Court's sentence in imposing the low end of
8 the applicable guideline range, the 262 months, and it also
9 factored in, in part, to my consideration of whether to accept
10 the plea -- the binding plea agreement in the first place, I
11 find these factors do not support a variant sentence for the
12 reasons that I'm going to place upon the record for this
13 sentence I imposed.

14 I also in denying the motion for variant sentence point out
15 that the 36 months is a big part of why I denied and did not
16 accept the original binding plea to 36 months in Ms. Toebbe's
17 case, and I incorporate all of my prior rulings at that
18 proceeding -- the one where I rejected the original binding
19 plea -- as further support and reasoning for rejecting and
20 denying the motion for variant sentence that was made today by
21 the government and the defendant.

22 I'll point out that this is not your usual case. Everyone
23 has recognized this. These are not your usual defendants. And
24 this type of case is certainly not the usual nature of cases we
25 see in this courtroom in the Northern District of

1 West Virginia. I look at every defendant in every case from
2 the smallest crime to the largest crime which I think with this
3 crime has hit the top of those we've seen in this courtroom or
4 at least I've seen. I view the cases as unique, the offenses
5 as to these defendants unique, and the defendant's unique
6 characteristics and all those other considerations I must
7 consider under 18 U.S.C. § 3553(a).

8 In looking at parity or disparity between other espionage
9 cases where defendants were sentenced and this case, I'll note
10 there aren't a lot of them. And each -- the facts of each of
11 those cases are very different, and the defendants are very
12 different as well. For example, it wasn't in the table that
13 was provided by defense counsel, but Mr. Beck mentioned Ron
14 Hansen. So we took a look in the back. There was a DOJ press
15 release on that case, and this is the information I believe in
16 that press release that sets that case apart from this case.
17 This is a defendant from Utah. He was 60 years old at the time
18 he was sentenced. He admitted he solicited national security
19 information from an intelligence case officer working for the
20 DIA. The documents he received were classified. Those
21 documents included national security information related to
22 U.S. military readiness in a particular region.

23 What the information that Mr. Toebe wanted to provide was
24 related to military readiness anywhere in the world where those
25 submarines would be. This was information closely held by the

1 federal government in Mr. Hanson's case as well though. Hanson
2 did not pose a security clearance -- did not possess a security
3 clearance, and he didn't possess the need to know the
4 information contained in his materials.

5 I also looked at Table 8, and I appreciate it. It was
6 helpful to look at those cases. I looked at Table 8 that
7 Mr. Beck referenced, and I did see the initial prison sentences
8 and years that were set forth and the number of individuals
9 that -- granted, and we all agree, there aren't a lot of these
10 espionage cases. But I went to the low end, but also on the
11 high end, there were 21 cases according to my math that
12 resulted in life sentences. So, obviously, some judges did
13 deem the sentences that needed to be imposed in those cases
14 even higher than what was before the Court in this case.

15 As we noted, every case is unique before the Court and
16 every defendant is unique, and I considered that, but they do
17 share some similarities. For example, when we look at whether
18 lookouts are less culpable than the principal in the case, and
19 we look at that in the context of an offense that charges
20 conduct that had the potential for harm, physical harm to come
21 to individuals. We often see a robbery case, for example, an
22 armed robbery, where the armed robber goes into the bank, and
23 there are individuals who are placed at risk, risk of their
24 lives or at least risk of injury, and we've got a lookout
25 outside. That's a limited number of people in that bank. If

1 we zoom out from that small view in a bank during an armed
2 robbery to the lookout situation in this case where we had the
3 potential for harm to U.S. soldiers, the military, civilians --
4 not in one location, not a small number of people, but in this
5 country, across the world, that's a huge lens, and that's the
6 lens that I used to, in part, impose a sentence that I impose
7 today.

8 In looking at the specific reasons for the sentence imposed
9 here today, aside from what I've already mentioned, the
10 defendant's conduct in this case was very serious in nature as
11 evidenced by the substantial penalties associated with her
12 conviction. Her actions posed a legitimate concern for the
13 national security interests of this country.

14 Her activities had the potential to undermine countless
15 hours of effort made by an untold number of individuals and
16 service to the U.S. and could have endangered military service
17 personnel and compromised the security of military assets.
18 This conduct at a minimum spanned a period of many months. The
19 scheme required substantial preplanning and considerable
20 efforts were undertaken to avoid detection and disruption. The
21 defendant was an acknowledged co-conspirator and committed
22 partner to this endeavor. She was not a minor participant.

23 She, by her own acknowledgement, knew of the scope of the
24 conspiracy. She was aware of the special relationship her
25 husband had established with an entity he believed to be a

1 foreign government. She was positioned to benefit jointly in
2 the illicit proceeds of the unauthorized distribution of the
3 restricted data. While the defendant didn't have access to the
4 restricted data at its source within the United States Navy,
5 she did have access to it after it was removed from its proper
6 place by her husband.

7 Indeed the defendant participated directly in the
8 distribution by accompanying her husband to drop deads -- dead
9 drops in order to transfer the restricted data and by acting as
10 a lookout.

11 The defendant's involvement in the offense conduct appears
12 to have been motivated largely by greed, financial gain. She
13 was not coerced into engaging in this conduct. And, quite
14 frankly, in looking at the communication between the
15 codefendants in this case when I was preparing to rule upon
16 Ms. Toebbe's appeal of the MJ -- the magistrate judge's bond
17 decision in this case and the intercepted communication between
18 Mr. Toebbe at the jail -- well, actually not between the
19 intercepted communication that Mrs. Toebbe was trying to get to
20 Mr. Toebbe at the jail, pretending to spin that cover story,
21 trying to get him to perjure himself, to say she wasn't
22 culpable, to indicate that he was the one that was driving the
23 bus, and she was basically a bystander or innocent, it's clear
24 to this Court that it was most probably Mrs. Toebbe that was
25 driving the bus. While Mr. Toebbe had the access to the

1 information, she was a big part of the plan. Not only in
2 carrying out the plan but also in the coverup story.

3 She was directing the furtherance of this conspiracy
4 through those letters that were intercepted. She was telling
5 Mr. Toebbe in those letters basically to deploy the plan. To
6 tell the truth is what she called it; but even she knew, and he
7 certainly knew, that she didn't want him to tell the truth.
8 She wanted him to lie.

9 At the time of the offense, Mrs. Toebbe had positive family
10 ties. She possessed an advanced education. I think she's kind
11 of referred to here in court today by counsel as, you know,
12 housewife, teacher, but she had an advanced education, and she
13 was gainfully employed.

14 The defendant made a deliberate and calculated choice to
15 act in pursuit of her own interests. She disregarded the risks
16 to her family, her children, and her nation in doing so. And
17 she's now confronted with the consequences unfortunately of
18 those choices. In considering even at a basic level whether to
19 accept the binding plea in this case, I compared the
20 defendant's exposure, worst case scenario if she went to trial
21 and was convicted on all three counts, to the guideline
22 calculations pursuant to the plea agreement. Because the
23 counts would be grouped for guideline calculations and the
24 Court would run them, as I would -- as is suggested in the
25 guidelines, concurrently, unless there's some exceptional

1 circumstance, there is no difference between the guideline
2 calculations if Mrs. Toebe had gone to trial and been
3 convicted on all three counts and if the Court accepted the
4 binding plea under the guideline calculations, which I found to
5 be appropriate and applicable in this case.

6 But aside from that, I also considered the following: The
7 uncertainty of obtaining a conviction at trial; whether the
8 government's hard sell on the variance in this case here today
9 and the first binding plea may be an indication of perhaps a
10 hesitancy to try this case because perhaps there's some defect
11 in this case that we're unaware of; the costs and time of a
12 trial to the government and the defense; the lengthy sentences
13 and length of sentences imposed in other espionage cases as
14 I've previously commented on, both those at the low end and
15 those at the high end; the potential of leaks that could come
16 from a trial and further harm our nation's security; and the
17 time and distance between the sentence imposed today and the
18 time the defendant would potentially be able to distribute any
19 information she or her husband held onto when she was released
20 from incarceration.

21 Looking at the length of this sentence and given likely
22 technological and military advances, by the time this defendant
23 is released from imprisonment, any information she has would
24 most certainly be outdated, stale, and worthless to any nation
25 who would want to cause us harm.

1 Finally, I considered the -- not only the original letter
2 from Admiral Houston that was the victim impact statement but
3 the one that I received after the second plea agreement was
4 made. It was a supplemental victim impact statement, and he
5 told me that on behalf of the Navy, the Navy supported both
6 plea agreements in this case. He stated that the plea
7 agreement further accomplishes final resolution of the cases
8 with -- and this was important to me -- with no further risks
9 to national security.

10 But he made a point to add in that supplemental victim
11 impact statement, as explained in Reference A, meaning the
12 original victim impact statement, the betrayal by the Toebbes
13 has had far-reaching consequences for the United States and the
14 sailors and the families who serve the United States Navy.

15 Based on defendant's involvement in the instant offense,
16 her personal history and characteristics, her lack of prior
17 criminal history, her conduct in this case both during the
18 course of the offense before she was incarcerated and
19 throughout her incarceration at the jail, and considering the
20 great impact her actions have had on this nation's security
21 and, in fact, the security of the world in these times that we
22 sit in today most especially, the defendant received a sentence
23 of 262 months' imprisonment. This term of incarceration
24 reflects the very serious nature of this offense and will hold
25 the defendant accountable for her actions.

1 Overall, this sentence meets the sentencing objectives of
2 punishment, general deterrence, incapacitation, and
3 rehabilitation. The three-year term of supervised release will
4 allow the probation office to monitor defendant's conduct in
5 the community following her release from incarceration and
6 hopefully assist her in returning to a law-abiding lifestyle.

7 I'll dismiss the remaining counts of the indictment upon
8 motion of the government which should be two and three.

9 MR. DOUGLAS: So moved, Your Honor.

10 THE COURT: Granted. And I ask the probation officer
11 to prepare the judgment and commitment order.

12 Mrs. Toebbe, although a defendant who has pled guilty has
13 the right to appeal from the judgment of this Court, a
14 defendant who has pled guilty may waive that right as part of a
15 plea agreement. You entered into a plea agreement which waived
16 in whole or in part your right to appeal your sentence. Those
17 types of waivers are generally enforceable, and it appears as
18 though it's enforceable in your case. However, if you believe
19 the waiver in your plea agreement is somehow unenforceable, or
20 you believe your guilty plea was somehow unlawful or
21 involuntary, or you believe there's some other defect in these
22 proceedings you didn't waive by your guilty plea, then you can
23 present that theory to the appellate court.

24 However, if you decide to appeal, you must file a notice of
25 appeal within 14 days following entry of the judgment and

1 commitment order. If you request, the clerk of court will
2 forthwith file a notice of appeal on your behalf. And if you
3 desire counsel on appeal, and you can't afford a lawyer, the
4 appropriate court will review your financial affidavit to
5 determine your eligibility for court-appointed counsel.

6 Anything further on behalf of the government?

7 MR. DOUGLAS: No, Your Honor. Thank you.

8 THE COURT: Anything further on behalf of your
9 client, Mr. Beck?

10 MR. BECK: No, Your Honor.

11 THE COURT: All right. Does your client wish to be
12 remanded to the custody of the marshals now and go back to
13 holding or would she prefer to stay here for Mr. Toebbe's
14 proceeding?

15 MR. BECK: She would like to stay if that's an
16 option, Your Honor.

17 THE COURT: That's an option.

18 MR. BECK: She would like to stay.

19 THE COURT: All right. Counsel, do you need a break
20 before we go into Mr. Toebbe's case or should we keep on going?

21 MR. COMPTON: I'm fine to proceed, Your Honor, as is
22 the defendant.

23 THE COURT: Okay. No one needs a comfort break? I'm
24 sorry, Mr. Douglas. I cut you off.

25 MR. DOUGLAS: No, the government is prepared to

1 proceed as well.

2 THE COURT: Okay. We already have Mr. Toebe under
3 oath; correct?

4 THE CLERK: Correct.

5 THE COURT: All right. Mr. Compton, I'll turn to you
6 then. Have you received the presentence investigation report
7 and gone over it with your client?

8 MR. COMPTON: Yes, Your Honor.

9 THE COURT: And, Mr. Toebe, most importantly, have
10 you received that revised presentence investigation report and
11 reviewed it to your satisfaction with your lawyer?

12 DEFENDANT JONATHAN TOEBBE: Yes, Your Honor.

13 THE COURT: Mr. Douglas, has the government received
14 and reviewed it?

15 MR. DOUGLAS: Yes, Your Honor.

16 THE COURT: All right. I think we have to take a
17 look at the objections, do we not, counsel?

18 MR. COMPTON: Your Honor, I can hopefully speed this
19 along. Objections 1, 2, 3, 4 have been resolved to our
20 satisfaction and --

21 THE COURT: Is six moot now because of the nature of
22 the binding plea or not? I skipped over five.

23 MR. COMPTON: It is, Your Honor. That was my very
24 next statement --

25 THE COURT: Okay. I'm sorry. I cut you off.

1 MR. COMPTON: No. No, Your Honor --

2 THE COURT: Okay.

3 MR. COMPTON: My very next statement, Objection 6 is
4 also moot and withdrawn because of the binding term of the
5 plea, and we are not asking for a variant sentence. That just
6 leaves us with Objection No. 5. It's very minor, and it's
7 really only half of Objection 5.

8 THE COURT: The first paragraph is gone of your
9 objection -- right? -- and we're only dealing with the terms of
10 the supervised release?

11 MR. COMPTON: Yes, Your Honor, and it's --

12 THE COURT: Okay.

13 MR. COMPTON: Again, it's just a very minor -- and I
14 noted that the Court imposed the exact same condition when
15 sentencing Mrs. Toebe. I just had a concern about the
16 condition at paragraph 224 where it says --

17 THE COURT: Let me turn to that real quick --

18 MR. COMPTON: Yes, ma'am.

19 THE COURT: -- because I had made some notes. Hold
20 on. Okay. I'm with you. As it reads now, "You must not
21 engage in any occupation, business, profession, or volunteer
22 activity that would require or enable you to have access to
23 classified government information without the prior approval of
24 the Court."

25 And you suggest a tweak to that?

1 MR. COMPTON: Well, I'm just not sure it's necessary,
2 Your Honor. I don't know -- the access to classified
3 information is determined and granted by the executive branch.
4 Mr. Toebbe is about to be convicted of a felony offense which I
5 believe by its terms disqualifies him from having access to
6 classified information. And so I don't know of a scenario in
7 which the defendant would be in a position to have access to
8 classified information or where the Court would be in a
9 position to approve or disapprove of the defendant having
10 access to classified information. It seems to be a -- sort of
11 a -- an over -- I don't want -- it's not -- overreach is not
12 the right word, but it's -- and neither is piling on, but it's
13 more of a -- it's just not necessary. It's --

14 THE COURT: Well, how would it hinder him in any
15 future employment once he's released from incarceration?

16 MR. COMPTON: I don't think it would injure him, Your
17 Honor, but I --

18 THE COURT: Or hinder him I think was my word.

19 MR. COMPTON: I'm sorry?

20 THE COURT: How would it hinder him? H-I-N-D-E-R.

21 MR. COMPTON: Oh, hinder. Well, I don't think it
22 would, Your Honor, but I don't think that that is the analysis
23 when we're looking at what conditions are to be imposed on
24 supervised release.

25 THE COURT: I agree. But here's the way I look at

1 it, and I'm not terribly tech savvy, but let's -- I know he's
2 forever foreclosed based upon his conviction and his actions
3 from working in the capacity he had been working for the
4 government and to officially have access to any sort of
5 classified information. But I can't think of, specifically,
6 the situation in which it would arise, but let's say he's
7 working for the IT department somewhere, and he somehow is able
8 to gain access to classified information. I just -- I just
9 would like to err on the side of caution as opposed to just
10 removing this totally.

11 MR. COMPTON: Perhaps sort of in the vein of -- was
12 it Henshaw where we were tweaking the condition that -- I
13 believe it started out by saying the defendant shall not, and I
14 think we tweaked it to say that the defendant -- the
15 employment -- the defendant can, you know, seek employment
16 subject to the approval of the probation office. The probation
17 office shall approve employment unless it appears to the
18 probation office that there is some impact to national security
19 or some association with classified information.

20 I don't -- I'm a little -- I'm having a little trouble
21 trying to say how to phrase it because I just don't -- I don't
22 think that -- I don't think there's a scenario where it would
23 come up where the defendant -- again, not like the scenario
24 where we're talking about someone involved in perhaps a child
25 exploitation who might, you know, be in a position where they

1 could get a job as a delivery person which might raise some
2 questions with the probation office. I just don't think
3 there's a scenario here where Mr. Toebbe would come to the
4 probation office and say, hey, I just got a job at the nuclear
5 lab down in Oak Ridge. Can you -- what do you -- is it okay?
6 I don't see that as being a scenario so I'm having a little
7 trouble trying to phrase it.

8 THE COURT: So basically what you suggest in trying
9 to think of how to rephrase it is to modify this to state that
10 the defendant must seek approval of probation before he begins
11 any new employment and that probation must approve the
12 employment unless it would require or enable the defendant to
13 have access to classified government information.

14 MR. COMPTON: I would be satisfied with that, Your
15 Honor. I think that the -- I think the probation office is
16 required to approve employment by standard conditions. That
17 provides the probation office or that directs the probation
18 office to approve employment unless it would have some impact
19 on national security issues or classified information issues.
20 If it does and there's no approval, I think that would, at that
21 point, trigger Mr. Toebbe to be able to come to the Court and
22 seek approval through the Court if he wishes to continue down
23 that line.

24 THE COURT: Okay. Mr. Douglas?

25 MR. DOUGLAS: No objection, Your Honor.

1 THE COURT: All right. What's fair to Mr. Toebbe is
2 fair to Mrs. Toebbe so I'm -- while we have her and her counsel
3 here, I'm going to make a change to those conditions in her
4 case, and it will be consistent with what my ruling is going to
5 be on this objection. That the defendant -- and this is how it
6 will be in Mr. Toebbe's case as well. The defendant must seek
7 approval -- well, let's back up. The defendant must advise
8 probation before beginning any occupation, business,
9 profession, or volunteer activity as to what that occupation,
10 business, profession, or volunteer activity is; and probation
11 must approve the occupation, business, profession, or volunteer
12 activity unless it would require or enable the defendant to
13 have access to classified government information. How is that?

14 MR. COMPTON: No objection, Your Honor.

15 MR. DOUGLAS: No objection, Your Honor.

16 THE COURT: All right. Mr. Beck?

17 MR. BECK: Your Honor, no objection. And may I just
18 make one other point? Ms. Toebbe brought up to me after you
19 imposed the sentence that because of the location of one of her
20 children, if the Court could make a recommendation that the BOP
21 place her as close as possible to Annapolis. Not San Diego.

22 THE COURT: Where are her children?

23 MR. BECK: Her oldest child is in school near
24 Annapolis, Your Honor, and she believes that being closer to
25 that child would be best for their family. If the Court would

1 be agreeable to recommend that instead of San Diego, she would
2 ask the Court to do that as well.

3 THE COURT: So the oldest one right now is how old?

4 MR. BECK: Sixteen, Your Honor.

5 THE COURT: And that child is in Annapolis. How much
6 further to go in school?

7 MR. BECK: Two more years of high school, Your Honor,
8 and then I --

9 THE COURT: Okay. And then college is up in the air.
10 Right. And then the younger child is in San Diego?

11 MR. BECK: Santa Cruz with --

12 THE COURT: Santa Cruz.

13 MR. BECK: Santa Cruz with her brother, Your Honor.

14 THE COURT: And how old is that child?

15 MR. BECK: Twelve, Your Honor.

16 THE COURT: Twelve. And it's your preference,
17 Ms. Toebbe, for me to make a recommendation to the Bureau of
18 Prisons that you be here -- well, you be housed in a federal
19 facility as close to Annapolis, Maryland, as possible to be
20 closer to your older 16 year old?

21 DEFENDANT DIANA TOEBBE: Yes, ma'am.

22 THE COURT: Okay. Then I'm going to change the
23 recommendation I made in that case to the Bureau of Prisons,
24 and it's my recommendation that Ms. Toebbe be housed at a
25 federal facility as close to Annapolis, Maryland, as possible.

1 MR. BECK: Thank you, Your Honor.

2 THE COURT: Does that satisfy your request?

3 MR. BECK: Yes, Your Honor. Thank you.

4 THE COURT: Sorry, Mr. Compton. I think that
5 concludes any objections you had to the PSR?

6 MR. COMPTON: That's correct, Your Honor.

7 THE COURT: All right. Nothing from the
8 government?

9 MR. DOUGLAS: No, Your Honor.

10 THE COURT: Okay. Then with the change made to the
11 employment condition, the PSR is accepted and ordered filed,
12 and made a part of the record herein. With that minor
13 revision, it'll be placed in the record under seal.

14 I will note for the record that on September 27, 2022, this
15 defendant appeared in the United States Magistrate Court for
16 the Northern District of West Virginia sitting in Martinsburg.
17 And at that time, he tendered a plea of guilty by a written
18 plea agreement to Count 1 of the indictment charging conspiracy
19 to communicate restricted data. After consideration, the Court
20 accepted the defendant's plea of guilty to the crime charged in
21 Count 1 and deferred acceptance of the plea agreement and
22 adjudging the defendant guilty.

23 Subsequent to acceptance of the guilty plea, a presentence
24 investigation report was ordered. Having now received that
25 report and ruled upon any factual and legal issues raised

1 thereby, I find the charge to which Mr. Toebe is pleading
2 adequately reflects the seriousness of the offense behavior. I
3 also find acceptance of the plea agreement won't undermine the
4 statutory purposes of sentencing which are deterrence,
5 incapacitation, just punishment, and rehabilitation.

6 So at this time, Mr. Toebe, I accept your plea agreement
7 and your plea of guilty, and you now stand convicted of the
8 offense to which you agreed to plead guilty under your
9 agreement with the government.

10 I'll now announce my tentative findings as to the
11 applicable guidelines. We start in this case with a base
12 offense level of 37 pursuant to Guideline 2M3.1(a)(2) because
13 the offense involved the communication of restricted data that
14 was classified at the confidential level. Then there's a
15 two-level adjustment for offense in the role. The defendant
16 abused a position of public trust and used a special skill in a
17 manner that significantly facilitated the condition or
18 concealment of the offense. Therefore, the offense level is
19 increased by two levels pursuant to Guideline 3B1.3. That
20 brings us to an adjusted offense level of 39.

21 Following that, there's a two-level reduction for
22 acceptance of responsibility under Guideline 3E1.1(a), and upon
23 motion of the government, there will be an additional one-level
24 reduction under Guideline 3E1.1(b).

25 MR. DOUGLAS: So moved, Your Honor.

1 THE COURT: Granted. We arrive then at a total
2 offense level of 36. Defendant has a criminal history category
3 of one based upon zero points. With a total offense level of
4 36 and a criminal history category of 1, the guidelines
5 recommend imprisonment in the range of 188 to 235 months. The
6 guidelines indicate that probation is -- the defendant is not
7 eligible for probation. The guidelines recommend two to five
8 years of supervised release, a fine in the range of 40,000 to
9 \$100,000, and there's a special assessment fee in the amount of
10 \$100 owed on that one felony count of conviction.

11 The cost of imprisonment is \$3,688 per month, the cost of
12 community confinement is \$2,980 per month, and the cost of
13 supervision is \$371 per month.

14 Are there any legal objections to the tentative guideline
15 findings, counsel?

16 MR. DOUGLAS: Not by the government, Your Honor.

17 MR. COMPTON: No, Your Honor.

18 THE COURT: Then the guidelines as announced will be
19 the advisory guidelines applicable to sentencing in this
20 matter.

21 Mr. Compton, I will hear from you now for a statement on
22 your client's behalf. I will tell you I've reviewed the
23 sentencing memorandum and its supplemental sentencing
24 memorandum in particular.

25 MR. COMPTON: Thank you, Your Honor. Your Honor, I

1 also have received this after I filed those, a letter written
2 on Mr. Toebbe's behalf by -- it's actually by an inmate of the
3 Eastern Regional Jail who is in protective custody with
4 Mr. Toebbe. I have marked it as Defendant's Exhibit 1 for
5 identification. I provided a copy to Mr. Douglas. I would ask
6 that this be admitted for the Court's consideration. It's one
7 page and a couple of lines on the top.

8 THE COURT: A lot of firsts for the Court today. The
9 government recommending a variant sentence lower than that
10 requested by the defendant, an inmate with a character
11 reference for the defendant --

12 MR. COMPTON: Well, I would like the Court to read
13 the letter, and then perhaps we can discuss it because I think
14 it -- I think it maybe talks more about Mr. Toebbe than --

15 THE COURT: Okay. And you've seen it, Mr. Douglas?

16 MR. DOUGLAS: Yes, Your Honor, I have.

17 THE COURT: Any objection to my reviewing it?

18 MR. DOUGLAS: No, Your Honor.

19 THE COURT: Okay. Give me a moment.

20 So is this Stacey Taylor a male or a female?

21 MR. COMPTON: It's a male, Your Honor.

22 THE COURT: Okay. All right. I reviewed it. We
23 will file it as part of the record in today's proceeding, but
24 I'm going to hang onto this, Chad. I may refer to it during
25 sentencing but make sure I get it back to you.

1 MR. COMPTON: Thank you, Your Honor, and good
2 afternoon. I know a lot has been said already today in this
3 case. Since I gave the Court this letter, I might as well just
4 start with it. You know, Mr. Toebe is in protective custody
5 because of the nature of the charges and what's, you know,
6 taken place over the course of the case. So he presented this
7 letter to me, and it was from this Stacey Taylor, who I don't
8 know anything about, but I do know that he's in the same
9 protective custody as Mr. Toebe so that prompted me to ask,
10 well, what is Stacey Taylor in protective custody for?

11 THE COURT: Did you ask the jail or did you ask your
12 client because --

13 MR. COMPTON: I --

14 THE COURT: -- sometimes they're not honest. Not
15 meaning your client but folks who are in protective custody.

16 MR. COMPTON: Well, I did ask. I asked my client,
17 Your Honor, and he was honest with me because he could have
18 told me something that was more palatable than being in there
19 for child exploitation which is what Mr. Taylor is in there
20 for. And not a good thing. Awful. And Mr. Taylor, whether
21 he's, you know, guilty or not, I don't -- I believe he's
22 awaiting trial in this case. It's a person nonetheless, as is
23 Mr. Toebe, who over the course of this case and in the media
24 and by lots of folks has been, you know, hit with that traitor
25 label which is never anything that you want to go around

1 through life with. But I thought this letter was interesting
2 and helpful to me because what it shows to me at least is we
3 got somebody like Mr. Taylor, guilty or not -- but let's
4 presume he is guilty of the worst kind of crime -- down at the
5 Eastern Regional Jail. He's doing his time, whatever, and he
6 comes across somebody like Mr. Toebe. And Mr. Toebe, maybe
7 because he's in the same type of situation, maybe because he --
8 I don't know what reason, but I tend to think that it's because
9 of the kind of person that Mr. Toebe is. Is that he doesn't
10 sit there and look at Mr. Taylor and say, "You're some kind of
11 child molester. Stay away from me. Get away from me. You're
12 not even worth me hanging around."

13 Mr. Toebe has done what he could because he has the
14 education, because he has the smarts, because he's not like the
15 typical inmate at the ERJ. To do what he can to help this man.
16 Now, he's not trying to help him, you know, get out of whatever
17 trouble he's in. He's not trying to help him, you know, beat
18 the rap.

19 THE COURT: He's not doing his legal work for him.

20 MR. COMPTON: He's not doing his legal work for him.
21 I don't think Mr. Toebe -- Mr. Toebe is a physicist, but he's
22 not a lawyer. I don't know that Mr. Toebe could do my job,
23 and I certainly, certainly couldn't do his. What he is doing
24 is helping Mr. Taylor where he can. GED classes, math
25 homework, being a human being to somebody who maybe doesn't

1 have a lot of human beings around him so to speak.

2 So I just wanted to bring that to this Court's attention,
3 and I think that sort of folds into the first thing I wanted to
4 mention which has been mentioned a lot I think today and all of
5 the filings that we made with the Court. And that's what I
6 will refer to as Mr. Toebbe's post-offense rehabilitative
7 conduct. His compliance with paragraph 7 of his plea
8 agreement. It's been nothing but phenomenal. I don't know how
9 else to describe it.

10 I think the government has described it in similar terms.
11 He has done everything that he can to -- in any way that he
12 can -- try and make right or atone in some small way for what
13 he has done. Not only with regard to his -- the specific case
14 that we are here for today but with regard to information that
15 the government didn't even know about. He has done phenomenal,
16 phenomenal work in trying to atone for what he has done. And I
17 think -- I don't know how more to express how much I think the
18 Court should give weight to that.

19 I know the government has multiple times here today and I
20 know the vice admiral has in their letter talked about how much
21 Mr. Toebbe has done. He's done that for several reasons. He's
22 done it to atone for what he has done. He's truly sorry. He
23 is truly sorry. And he's done it because -- and I -- and I've
24 spent now over a year with Mr. Toebbe. Despite what he did, I
25 believe -- and I feel confident standing before the Court in

1 saying this -- that I believe Mr. Toebbe truly loves his
2 country. I believe that. And I've spent, as I say, over a
3 year with him. And I think to his core, to his core, he
4 regrets what he has done. And I say that in context -- I know
5 the Court in sentencing Mrs. Toebbe -- and this is why I want
6 to just briefly put this in here. I know this Court looks at
7 every case separately. And every case is different, and every
8 case has different facts.

9 I cited one specific case for the Court which I thought had
10 facts sort of similar to this case. But one of the things that
11 stuck out to me that was different about that case -- and I
12 mentioned it in the thing -- is that that defendant who got a
13 lower sentence than Mr. Toebbe is looking at here, that
14 defendant had expressed, expressed to the agents that he was
15 dealing with, a hatred for this country. By the way, a country
16 that had taken him in. He was an immigrant. He expressed
17 hatred for this country and expressed a desire to -- and
18 expressed a plan to perhaps physically harm citizens within
19 this country.

20 THE COURT: So what's the difference really between a
21 hatred for the country and a disregard for the safety of the
22 country?

23 MR. COMPTON: Well, I don't know that there is a
24 difference, Your Honor. I think the two probably can go hand
25 in hand, but I think there's a -- what we have here, the

1 difference I see here is I believe that at the time or during
2 the period of time -- which this occurred over a period of
3 time. At the period of time that this was taking place,
4 Mr. Toebbe was experiencing a great deal of stress, a great
5 deal of tumult in his life. We talked about the issues that he
6 was having with his son.

7 Mr. Beck told the Court that Mrs. Toebbe at the time this
8 was going on was at the apex of the psychological problems that
9 she was dealing with. Mr. Toebbe was having stress issues at
10 work related to his employment, what he was being asked to do
11 at work, and then we add on top of this -- and this is not --
12 I'm not trying to say that this is -- had -- is the be all end
13 all or this has, you know, the major factor, but you add on top
14 of all of that this business about, you know, the direction of
15 the country and what was going on. You add all that together
16 and Mr. Toebbe, who was a -- who has been a physicist, who was
17 an active member of the United States military, honorably
18 discharged, why would he -- where does this come from? Why
19 does somebody all of a sudden decide, well, that's the reason
20 why? Not because he hates the United States. Not because he
21 wanted to see sailors dead. Not because this country was so
22 repugnant to him that he wanted to do everything he can to put
23 it down unlike Mr. Mascheroni in the case that I cited who had
24 a hatred. A hatred for his employer. A hatred for the
25 country.

1 Mr. Toebbe found himself in a situation where he -- I think
2 he almost felt hopeless in terms of how to proceed. And I
3 don't understand it. I don't know how to explain how somebody
4 then goes from, you know, my life is, you know, in the ditch --
5 how do I -- you know, what do I do, and then you go to start
6 with the secrets. I don't understand it. I don't know that I
7 can explain it to the Court. I don't know that Mr. Toebbe
8 expects the Court to understand it. But he made a decision,
9 and it was the worst decision of his life. It was the worst
10 decision that he could have come up with. And to his core and
11 for the rest of his life, he will regret taking that action.
12 That doesn't mean that he hates this country. I don't think he
13 does. I think he loves this country, and I think everything
14 that he has done since the moment those agents approached him
15 in Harpers Ferry to take him into custody, everything that he
16 has done since then has been in an effort to atone for the
17 absolute poor, poor decision-making that he's made over the
18 last few years.

19 And I don't say -- again, I'm not -- he has offered I think
20 a heartfelt and a thorough defendant's version statement to try
21 to explain to the Court where he is. I don't -- I don't think
22 he's trying to lay the blame for his decision-making at, you
23 know, the feet of his kids or the feet of his wife. He knows
24 what he did. He did it. Nobody was holding a gun to his head.
25 He had access to the information. And whether Mrs. Toebbe was

1 driving the train or not, he was the one that had access to the
2 information, and he was the one that could decide to take it or
3 leave it. And he made a decision.

4 But we offer that and he offers that not as an excuse. Not
5 as a, you know, get out of jail free. This is where his
6 mindset was. This is where he was. This is why somebody with
7 honorable military service and no criminal history all of a
8 sudden decides to haul themselves to Harpers Ferry and
9 Gettysburg for misconduct. I think the Court can see some of
10 that in something that I thought, you know, is a little -- is a
11 little unusual until you think about it for a little bit.

12 Mr. Toebe has no criminal history, no real serious, you
13 know, physical health issues. Clearly, there were some -- you
14 know, he was struggling with some -- I think some mental health
15 issues at the time -- but substance abuse. And we're not
16 talking about marijuana. We're not talking about crack. We're
17 not talking about, you know, he wasn't -- he wasn't out on the
18 street corner. What are we talking about? Something that we
19 skip over a lot of the times in this courtroom. Not because
20 it's not important. Just because we're dealing with more
21 harder stuff than alcohol. And doesn't that -- doesn't that
22 really express, you know, where he was in his mindset?

23 Mr. and Mrs. Toebe were suburbanites. You know, educated.
24 You know, you come home from a long day of work, you have a
25 glass of wine. Well, that's fine until, you know, you're

1 trying to, you know, deal with your child's very serious mental
2 health issues. You're trying to deal with your wife's very
3 serious mental health issues. You're trying to deal with the
4 issues at work. And the one glass of wine turns into two
5 glasses of wine, turns into three, turns into four, and all of
6 a sudden, you're drinking a lot at home.

7 I think that also incapsulates where his mindset was.
8 Where -- what was going on with him. And the fact that this
9 was not some, you know, I hate this country. How can I get --
10 how can I get back at this country? How can I do this? This
11 was a mindset that he had found himself in. And sort of like
12 what Mr. Beck was saying too -- and I think it's important.
13 Yes, this was an offense motivated by money. Is that the
14 definition of greed? Probably a generic definition, yes. But
15 I think -- I agree with Mr. Beck that this was not greed in the
16 sense that the Toebbes, you know, didn't like their house. It
17 was -- they thought it was, you know, too plain or, you know,
18 the mini or whatever it was that they were driving wasn't fancy
19 enough. That they wanted something more showy or classy for
20 the, you know, the private school set. That's not what we were
21 talking about here. The decision had been made as to how to
22 proceed and because that entailed going abroad that required
23 money.

24 THE COURT: Like in the amount that they were
25 seeking? Why didn't they just seek an amount, if that was the

1 case, that would pay off their debt and give them a little nest
2 egg to start over?

3 MR. COMPTON: Well, I think --

4 THE COURT: That's where it drops into greed; right?

5 MR. COMPTON: Well, I think if the Court -- if the
6 Court wants to -- if you want to look at their debt that's one
7 thing. I don't know that -- I think they had some debt and so
8 I don't know that that would necessarily be a lot. But also --
9 and I think as the Court in questioning Mr. Douglas, for
10 whatever reason -- I think probably because of security, you
11 know, security issues, they were dealing -- Mr. Toebbe was
12 dealing in cryptocurrency which, you know, one day is \$100,000
13 and the next day it's \$50,000. So, you know, I'm not -- I
14 don't know how secure that was.

15 The point though was -- I guess what I was trying to say
16 inartfully was -- is that in perhaps a lot of those cases that
17 have been cited, you know, we're not talking about \$100,000.
18 We're talking about a million dollars, a hundred million
19 dollars, or tens of millions of dollars. Because, again, the
20 folks aren't looking to -- you know, we're not looking just to
21 go to another country to get out of here or to leave our
22 problems behind. We're looking to, you know, live the high
23 life in some other country or to live the high life in Loudoun
24 County or, you know, to do whatever we want to do to make -- to
25 be powerful and wealthy. And I don't think that's the

1 situation that we have here.

2 The Court is well aware that Mr. Toebbe is highly educated.
3 He's highly employable. So after the period of his
4 incarceration, he is going to be, as he has been except for
5 this period of time, a model citizen. Again, I've mentioned
6 his military service to the Court. I had a note about
7 disparity and deterrence, and I think the Court addressed those
8 issues when sentencing Mr. -- Mrs. Toebbe, but just for the
9 record here, Mr. Toebbe has no -- there -- has no Plan C or
10 Plan D. He has no other information out there.

11 I think the Court correctly concluded in the previous
12 sentencing that by the -- given the guideline range and the
13 binding term, by the time that Mr. Toebbe would get out of
14 jail, the, you know, universe of technology will have passed --
15 any information that he had would pass them by. And the Court
16 read it out loud, the statement from the vice admiral. Final
17 resolution of the cases with no further risk to national
18 security.

19 Mr. Toebbe is not going to be able to get a security
20 clearance again. He's not going to be able to do this type of
21 work again. Any institutional knowledge that he may retain in
22 his mind and in his memory is going to be -- is -- I believe is
23 outdated now based on the admiral's statement, but certainly in
24 15 years, it's going to be worthless. And I can tell the
25 Court, because Mr. Toebbe has told me and because I know that

1 the government has done an extensive amount of investigation
2 into this case, again, based on -- because that's what they do
3 and also based on Mr. Toebbe's post-offense rehabilitative
4 conduct that there is nothing else that I believe that the
5 Court needs to be worried about.

6 And so I believe that this Court can feel comfortable in
7 sentencing Mr. Toebbe to the low end of the binding term, the
8 low end of the guideline range, 188 months. I believe that
9 takes into account and punishes him for the seriousness of his
10 misconduct, but it takes into account those 3553(a) factors
11 that we've presented to the Court both here and in our various
12 memoranda. And most importantly, it takes into account that
13 phenomenal post-offense rehabilitative conduct that I believe
14 Mr. Toebbe wanted to do, needed to do, and was right in doing
15 to begin to atone for what he's done.

16 THE COURT: Thank you, Mr. Compton.

17 Mr. Toebbe, you have the right to make a statement before
18 you're sentenced. Do you desire to address the Court, sir?

19 DEFENDANT JONATHAN TOEBBE: Yes, Your Honor.

20 THE COURT: All right. Come on up to the podium.

21 DEFENDANT JONATHAN TOEBBE: Your Honor, 13 months in
22 jail has afforded me a lot of time to think about what I have
23 done, about the enormity of my crimes, and about the people
24 that I have impacted. I failed in my responsibility to the
25 American people to preserve the secrets that were entrusted

1 with me. I've let down my respected colleagues at the
2 National Laboratories and at Naval Reactors. I failed my
3 family. I brought shame to them and trauma to my children and
4 to my wife.

5 I come before you deeply ashamed of what I have done. I
6 won't reiterate everything that I said in my written statement
7 in the presentence investigation out of respect for the medical
8 privacy of my children and for my wife, but I do want in some
9 way to explain my mindset as I carried out my crimes. Not to
10 shirk responsibility but to provide you some insight into
11 myself as a person. Hopefully to persuade you that I persuade
12 -- I pose no risk of recidivism. And also I pray that other
13 individuals in the government who may be at risk of becoming an
14 insider threat will become aware of this testimony and will
15 perhaps take heed and listen and recognize in themselves the
16 danger signs of a mental breakdown and seek help before taking
17 critical action before making the mistake that I did.

18 My family is everything to me. And the confluence of their
19 mental health problems and the added stress at work of taking
20 on my supervisor's responsibilities to free him up day to day
21 to take on a special project on behalf of the admiral added
22 tremendously to my workload and to my operational stress. The
23 COVID pandemic and the difficulties of managing government
24 remotely and appropriately handling classified information
25 ironically enough added to the stress that I was under, and

1 I began self-medicating with alcohol. And it got out of
2 hand.

3 And I believed that my family was in dire threat. That
4 democracy itself was on the verge of collapse, and that sort of
5 catastrophic thinking overwhelmed me, and I believed that I
6 must take -- must have taken precipitous action to try to save
7 them from grave harm. I recognize now that I was in the midst
8 of a nervous breakdown over a period of perhaps 18 months and
9 failed to recognize the warning signs. Failed to take
10 advantage of the resources that were available to me through
11 the Department of the Navy to help manage my operational
12 stress.

13 I should have known better. I should have done better.
14 And as a result, I endangered the men and women of the United
15 States Navy whose uniform I was so proud to wear. I betrayed
16 my colleagues at Naval Reactors and the National Laboratories
17 serving honorably in a job that I was so proud to share with
18 them. And I brought shame to my family. I have destroyed my
19 children's lives.

20 I can't take back what I have done. I can't fix it. I
21 can't put the toothpaste back in the tube. But by god, Your
22 Honor, I've tried.

23 In addition to my post-arrest rehabilitation that
24 Mr. Compton has referred to already, part of my interrogation
25 and debriefing was with the FBI's Behavioral Analysis Unit, the

1 Mindhunters. Again, attempting to help them come up with a
2 better profile for people like me in the hopes that they might
3 be able to intervene sooner and prevent the next threat from
4 happening. Not just for the protection of the country but to
5 save that lost soul.

6 I am in anguish over what I have done, and I know I will
7 never be able to make it right. In the ways that I am able, in
8 the ERJ, I've tried to reach out to fellow inmates to tutor
9 them in math. To help Mr. Taylor with his grammar. He has an
10 ambition to open a small business himself one day and wanted to
11 be able to speak properly when applying for a small business
12 loan.

13 My ambition while incarcerated is to continue to use those
14 skills and the blessings of my education to help other inmates
15 complete theirs in the hopes that that will put them on a
16 better path and reduce the risks that they will have to fall
17 back into that cycle of poverty and crime that so many inmates
18 face.

19 I beg Your Honor for lenience in sentencing to the bottom
20 end of the guidelines. I know what I did is wrong. I need to
21 be punished. But I beg you to give me the opportunity to be a
22 solid citizen again one day, to be involved in my children's
23 lives, to help them grow up and to take on the burdens of being
24 the good young men that I know they are. And I also ask for
25 the opportunity for my parents, my elderly parents, to live

1 long enough to see their prodigal son redeem himself in some
2 way. I hope that they will live long enough to see me a free
3 man once again. Thank you.

4 THE COURT: Thank you, sir.

5 Mr. Douglas.

6 MR. DOUGLAS: Your Honor, the government relies on
7 its written filings to continue to recommend a sentence of 210
8 months for this defendant. Specifically, the basis, if not the
9 primary -- if not the sole basis, is the post-offense
10 rehabilitative conduct which is most specifically and
11 thoroughly described in the government's classified filings.
12 Thank you, Your Honor.

13 THE COURT: Thank you, sir.

14 MR. COMPTON: Your Honor, I neglected to mention
15 Mr. Toebbe would ask that the Court recommend that he be housed
16 at the federal facility in Petersburg, Virginia, the Low.
17 Petersburg offers programming which I think will benefit the
18 defendant. I also think it will enable him to participate
19 perhaps on the teaching side of that programming for some of
20 the other inmates down there. Petersburg also offers I think
21 protective custody levels that may benefit this defendant given
22 the nature of the case.

23 And, lastly, Petersburg -- I think what the Court had heard
24 from Mr. Beck, the oldest son will be on the Eastern Seaboard.
25 His parents -- Mr. Toebbe's parents are in the Louisville area

1 and so it's sort of a centralized location.

2 THE COURT: Okay. So the federal facility in
3 Petersburg.

4 MR. COMPTON: Specifically, the Low. I understand
5 and Mr. Toebbe does that the Bureau of Prisons ultimately makes
6 those decisions.

7 THE COURT: Will make the classification. Right.

8 MR. COMPTON: Yes, ma'am.

9 THE COURT: Okay. I'll make that recommendation.

10 All right, counsel, we're going to take a brief break, and
11 then we'll get back out here on the record.

12 (Recess 2:55 P.M. - 3:30 P.M.)

13 THE COURT: Please be seated, everyone.

14 Anything further, counsel, before I impose sentence?

15 MR. DOUGLAS: Not by the government, Your Honor.

16 MR. COMPTON: Your Honor, I -- it just occurred to
17 me, if the Court imposes a fine in this case -- just thinking
18 as to the previous sentence -- we would ask that the Court
19 impose a schedule of payments on that. I don't know what the
20 defendant's ability is going to be to make payments while he's
21 incarcerated. I understand -- I'm sure he'll be working at
22 some point and making money. I know as the presentence report
23 indicates that there are some financial arrangements that can
24 be done. But to the extent that he may still owe some money
25 when he gets out, I would hate for him to be set up for failure

1 immediately upon walking out. If we can make a schedule of
2 payments for any fine in the amount of \$100 per month beginning
3 the 5th of the month following his release.

4 THE COURT: All right. This is what I'll do in
5 imposing a fine. I will order that the defendant pay \$100 a
6 month beginning the 5th of each month beginning 6 months
7 following his release from incarceration, and I'll change, with
8 regard to Ms. Toebbe's fine as well, the schedule of payments
9 so we don't set anybody up for failure here.

10 MR. COMPTON: Thank you, Your Honor.

11 THE COURT: Okay. Will the defendant please stand.

12 Pursuant to the Sentencing Reform Act of 1984, it's the
13 judgment of the Court that the defendant, Jonathan Toebbe, is
14 hereby committed to the custody of the Bureau of Prisons to be
15 imprisoned for a term of 232 months. This sentence of
16 imprisonment is at the higher end of the advisory guideline
17 range and the higher end of the binding term of imprisonment
18 contained in the plea agreement. You may have a seat,
19 gentlemen.

20 I make the following recommendations to the Bureau of
21 Prisons: That the defendant be incarcerated at the federal
22 facility in Petersburg, the Low; that the defendant be allowed
23 to participate in substance abuse treatment, including the
24 500-Hour Residential Drug Abuse Treatment Program as determined
25 by the Bureau of Prisons; and that he be given credit for time

1 served since October 9, 2021.

2 Upon release from imprisonment, Mr. Toebe, you shall be
3 placed on supervised release for a term of five years. While
4 on supervised release, you must comply with the following
5 mandatory conditions: You must not commit another federal,
6 state, or local crime. You must not unlawfully possess a
7 controlled substance. You must refrain from any unlawful use
8 of a controlled substance. You must submit to one drug test
9 within 15 days of release from imprisonment and at least two
10 periodic drug tests thereafter as determined by the Court. And
11 you must cooperate in the collection of DNA as directed by the
12 probation officer.

13 You must also comply with the standard conditions that have
14 been adopted by this Court in its November 29, 2016, standing
15 order as well as the following special conditions: You must
16 submit to substance abuse testing to determine if you used a
17 prohibited substance and must not attempt to obstruct or tamper
18 with the testing methods. This condition assists the probation
19 officer in identifying treatment needs, providing rehab
20 services, reducing the risk of recidivism, and provides for
21 protection of the community.

22 You must not use or possess any controlled substances
23 without a valid prescription. If you do have a valid
24 prescription, you must disclose the prescription information to
25 your probation officer and follow the instructions on the

1 prescription. This condition assists probation in reducing the
2 risk of recidivism and provides for protection of the
3 community.

4 You must provide the probation officer with access to any
5 requested financial information and authorize the release of
6 financial information. The probation officer may share that
7 financial information with the U.S. Attorney's Office. This
8 condition assists the probation officer in legitimizing
9 defendant's employment and/or income, provides protection for
10 the community, and aids in the maximum collection of financial
11 penalties.

12 You must not engage in -- well, let's put it this way. We
13 reworded that section as far as the employment. You're
14 required to advise your probation officer of any new
15 occupation, business, profession, or volunteer activity before
16 you start, and the probation office must approve employment
17 unless that occupation, business, profession, or volunteer
18 activity requires or enables Mr. Toebbe to have access to
19 classified government information.

20 Unless excused for legitimate reasons, if not in compliance
21 with the condition of supervision requiring full-time
22 employment at a lawful occupation, you may be required to
23 perform up to 20 hours of community service per week until
24 employed as approved or directed by your probation officer.
25 This condition assists probation in reducing the risk of

1 recidivism and provides for protection of the community.

2 It's further ordered the defendant shall pay the United
3 States a special assessment fee in the amount of \$100.

4 And, Chad, was that paid or not?

5 THE CLERK: It was paid, yes.

6 THE COURT: It was paid. I'll note it has been paid
7 in full.

8 It's further ordered the defendant pay a fine in the amount
9 of \$45,700. I take that amount into consideration because
10 that's the amount that -- of the money, the earnest money that
11 was not recovered. I don't find that the defendant or his wife
12 should profit because of a loophole in the guidelines or the
13 sentencing parameters in this case.

14 Additionally, defendant has agreed to forfeit to the United
15 States all right, title, and interest in the following items
16 that the defendant agrees constitute money, property, and/or
17 assets derived from or obtained by the defendant as a result of
18 his illegal activities: All papers, digital media, and
19 electronic devices seized from his residence, his vehicles, and
20 his Naval Reactors offices in October 2021.

21 In reaching my decision as to the proper sentence to be
22 imposed, I did consider all those factors set forth in
23 18 U.S.C. § 3553(a). Specifically, the reasons for the
24 sentence imposed here today are as follows: The defendant
25 before this Court turned 44 years old today. He is a son, a

1 husband, and a father. He has no prior criminal record. By
2 all counts, he was raised by successful and supportive parents,
3 who served as role models, who financially supported him
4 through his various educational endeavors, and who encouraged
5 him to set and achieve his goals.

6 His personal history and list of accomplishments reads of
7 one that many strive for but few achieve. He holds multiple
8 college and advanced degrees. He was an educator. He served
9 in the U.S. Navy, and he entered an elite career field that
10 someone can only achieve through hard work, dedication, and
11 trust.

12 The Court has reviewed the circumstances of the instant
13 offense. It's very clear that defendant's actions were
14 calculated and required advance planning over several years to
15 avoid possible detection. In a manner that reads like a crime
16 novel or a movie script, the defendant abused his position of
17 trust and his skill as a nuclear engineer in the Naval Nuclear
18 Propulsion Program to threaten national security. The
19 defendant's actions and greedy self-serving intentions placed
20 military service members at sea and every citizen of this
21 country in a vulnerable position and at risk of harm from
22 adversaries.

23 In his own words, the defendant's family, and I quote, "has
24 always been of primary importance," end of quote, in his life.
25 In seemingly searching for a palatable excuse for his actions,

1 the defendant suggests that he was devoted to protecting his
2 family so he made the decision to steal restricted data to help
3 them escape, quote, "the collapse of American democracy," end
4 of quote. Those are his words. He minimizes his actions,
5 placing the protected information he stole into categories of
6 "what," and then he opted not to steal the "hows" and the
7 "whys." He justified his actions by stating he was trying to
8 limit the damage to the U.S., a country he was proud to serve
9 and swore an oath to protect.

10 The defendant was keenly aware of the consequences that he
11 could face by his misconduct. He acknowledged to his wife in
12 communications that another country may not honor the skills
13 that he has to offer. When the defendant took an oath, he was
14 made aware of the legal consequences of violating the terms of
15 his employment with the United States. The defendant comes
16 face to face with these consequences today.

17 The unintended consequences of the defendant's activity
18 unfortunately are equally significant. First, his children
19 lost critical time with their father while he was planning and
20 acting on his crime. This was a time he could have spent
21 focusing on their immediate needs.

22 Secondly, the defendant will serve a term of imprisonment
23 that will not be present -- and will not be present to protect
24 and guide his children as a father should when they face life's
25 challenges.

1 Third, the defendant may have already spent his last time
2 with his parents prior to his incarceration which is a scenario
3 that he created for his own mother and father.

4 Lastly, the United States, defendant's mentees and former
5 coworkers and friends can no longer trust the defendant. The
6 cumulative impact of the defendant's crime remains to be seen.

7 Based on defendant's involvement in the instant offense,
8 his personal history and characteristics, and his lack of
9 criminal history, the sentence imposed here today is warranted.
10 It's sufficient but not greater than necessary. The sentence
11 incorporates the binding term agreed on by the parties in the
12 plea agreement, reflects the serious nature of the offense, and
13 takes into consideration the risk to national security, the
14 position of the Navy, but most importantly, the risk to
15 national security created because of the defendant's own
16 actions. This sentence will also provide defendant with an
17 opportunity to address his substance abuse issues and explore
18 long-term career options.

19 In a recent -- speaking of the position of the Navy, in a
20 recent supplemental victims impact statement, Admiral Houston
21 reported to the Court that the Navy agreed to both of the plea
22 agreements in this case, and I gave that weight in determining
23 whether to accept this plea and how to sentence the defendant.
24 I also gave weight to what the vice admiral went on to say. He
25 went on to say, "Not only that the plea agreement further

1 accomplished final resolution of the case with no further risks
2 to the national security," but he also said, "As explained in
3 Reference A" -- meaning the original victim's impact statement
4 -- "the betrayal by the Toebbes has had far-reaching
5 consequences for the United States and the sailors and families
6 who serve the United States Navy."

7 Also, I compared the defendant's worst case scenario
8 exposure if he was convicted of all three counts in this
9 indictment at trial under the guidelines which would require me
10 to group those three counts for calculation purposes and also
11 to, most importantly, consider without exceptional
12 circumstances, have those counts run concurrently.

13 Worst case scenario if this defendant went to trial, the
14 range of imprisonment under the advisory guidelines would be
15 262 to 327 months. That's 21 1/2 years to 27 1/4 years based
16 on my math. With acceptance of this binding plea, which the
17 Navy supported, the guidelines recommended, as I stated at the
18 beginning during my calculation, 188 to 235 months. That's
19 15.6 to 19.5 years.

20 I also had further considerations in support of the
21 sentence imposed, and they're as follows: I considered the
22 intangibles and nuances of trying this case and the fact, as we
23 all know, that going to trial doesn't guarantee a conviction of
24 any or all counts. I considered the trial costs associated
25 with trial, the potential for leaks that could further harm

1 this country's security during the course of trial, the length
2 of sentences imposed in other cases but also the specifics of
3 those cases, which are all different than that case that's
4 before me. I considered the time and distance that this
5 sentence places between the defendant now and the defendant
6 when he's finally released from incarceration in the light that
7 hopefully technology and military advances will have advanced
8 to the point where any information he may have retained for
9 redistribution will be stale or worthless.

10 I also considered the defendant's role in the cover story
11 that was concocted before he was arrested in this case, but I
12 also considered some other mitigating factors. I considered
13 his post-offense rehabilitative conduct which the government
14 agreed with the defendant about. I considered in contrast to
15 Mrs. Toebbe that this defendant made productive use of his time
16 in the jail. Not only with the rehabilitative conduct but also
17 even helping to improve those of lesser station, who would be
18 considered of lesser station considering the charges that
19 Mr. Taylor is facing in the jail.

20 Nonetheless, even though Mr. Toebbe and Mr. Taylor's worlds
21 collided there in the jail, Mr. Toebbe acknowledged that
22 Mr. Taylor was an individual just as himself, he was a human
23 being, and put Mr. Taylor's charges and alleged conduct aside
24 and helped him with his GED studies. I think Mr. Compton
25 mentioned he helped him with his math. Mr. Toebbe indicated he

1 was helping others to improve upon their education in the jail
2 as well. In fact, he even helped Mr. Taylor, according to what
3 Mr. Taylor reports to the Court, learn how to play chess which
4 is not easy, but that gave him something else to focus on to
5 help him productively pass his time. So Mr. Toebbe deserves
6 some credit for productive use of his time in jail.

7 Also in contrast to Mrs. Toebbe, both in writing in the
8 statement from the defendant in the PSR as well as his
9 presentation here in court, I found that his remorse that he
10 expressed to the Court was genuine. I think he was -- is truly
11 ashamed and sorry for his actions, and I took that into account
12 as well.

13 Overall, this sentence of imprisonment meets the sentencing
14 objectives of punishment, general deterrence, incapacitation,
15 and rehabilitation, and it will promote respect for the law.
16 This sentence also reflects a commitment to protect our
17 nation's security as a whole and to serve as a warning to
18 those who are entrusted with valuable government secrets that
19 if you break the law and you're caught, you can and will be
20 punished.

21 A term of supervised release is required. In this case, a
22 five-year term of supervised release was imposed and that will
23 allow the probation office to monitor defendant's conduct in
24 the community and will assist him in leading a law-abiding
25 lifestyle when he is released from incarceration. This term of

1 supervised release will also assist the probation office with
2 monitoring the defendant's financial resources, his substance
3 abuse tendencies, and will provide the defendant with
4 additional guidance, support, and resources for obtaining
5 gainful employment to meet his family responsibilities.

6 I'll grant the motion of the government and dismiss the
7 remaining counts of the indictment which are two and three,
8 Mr. Douglas?

9 MR. DOUGLAS: So moved, Your Honor.

10 THE COURT: Granted. And I ask probation to prepare
11 the judgment and commitment order.

12 Mr. Toebbe, although a defendant who has pled guilty has
13 the right to appeal from the judgment of this Court, a
14 defendant who has pled guilty may waive that right as part of a
15 plea agreement. You entered into a plea agreement which waived
16 in whole or in part your right to appeal your sentence. Those
17 types of sentences are generally enforceable, and it appears as
18 though it's enforceable in your case. However, if you believe
19 the waiver in your plea agreement is unenforceable for some
20 reason, or you believe your guilty plea was somehow unlawful or
21 involuntary, or you believe there's some other defect in these
22 proceedings you didn't waive by your guilty plea, you can
23 present that theory to the appellate court.

24 However, if you decide to appeal, you must file a notice of
25 appeal with the clerk of this court within 14 days following

1 entry of the judgment and commitment order. If you request,
2 the clerk of court will enter a notice of appeal for you. And
3 if you desire counsel on appeal, and you can't afford a lawyer,
4 the appropriate court will review your financial affidavit to
5 determine your eligibility for court-appointed counsel.

6 Anything further on behalf of the government, Mr. Douglas?

7 MR. DOUGLAS: No, Your Honor.

8 THE COURT: Anything further on behalf of your
9 client, Mr. Compton?

10 MR. COMPTON: No, Your Honor. Thank you.

11 THE COURT: All right. Both defendants are remanded
12 to custody.

13 MR. DEHAVEN: Your Honor --

14 THE COURT: Yes, sir.

15 MR. DEHAVEN: -- the Court did not mention anything
16 about potential waiver of the interest requirement on the fine
17 for either defendant.

18 THE COURT: Oh, I'm sorry. I'm going to waive the
19 interest requirement on those fines in both cases. I think
20 that the fine is sufficient enough, and I don't find with the
21 size of that fine that the defendants are going to have the
22 resources to also pile on, for the amount of time they're
23 serving incarcerated, interest on those.

24 Thank you, Mr. DeHaven, for catching that. Anything
25 further from anyone?

1 MR. DOUGLAS: No, Your Honor.

2 THE COURT: All right. Defendants are remanded.

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4 (Hearing concluded at 3:55 P.M.)

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CERTIFICATE

I, Kate A. Slayden, Registered Professional Reporter and Official Court Reporter of the United States District Court for the Northern District of West Virginia, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above-styled action on November 9, 2022, as reported by me.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Given under my hand this 12th day of January 2023.

/s/Kate A. Slayden

Kate A. Slayden, RPR
Official Reporter, United States
District Court for the Northern
District of West Virginia